

## DICTA REDEFINED

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### I. INTRODUCTION

The law of stare decisis contains two basic and virtually undisputed principles. First, the doctrine of vertical stare decisis requires lower courts to follow a higher court's holdings.<sup>1</sup> Second, lower courts are not bound to follow the dictum of a higher court.<sup>2</sup> Despite the surface-level distinction between holdings and dicta, courts often treat dicta no differently than case holdings,<sup>3</sup> and dicta is

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1. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994) (“It is to the holdings of our cases, rather than their dicta, that we must attend . . .”). Most courts and scholars agree that judges are only presumptively bound to follow the holdings of a higher court, and that judges can depart from precedent in narrow circumstances. See, e.g., Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 (1994). Although this presumption enjoys nearly universal agreement, the underlying basis for this requirement has been disputed. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988) (suggesting that, as a constitutional matter, the principle of stare decisis inheres in the ‘judicial power’ of Article III; and that, *stare decisis* “could possess the nature of constitutional common law: not a constitutional imperative, but simply the natural result of judicial powers and duties established in the [Constitution]”); see also *Anastasoff v. United States*, 223 F.3d 898, 903 (8th Cir. 2000) (arguing that stare decisis was a core component of the common law and therefore implicit in the Framers’ understanding of what it means to exercise judicial power, and that when Article III vested the “judicial power” of the United States in the federal courts, it necessarily required them to follow precedent). *But see* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 91–106 (2001) (arguing that stare decisis is not dictated by the understanding of “judicial power” as it existed at the Founding).

2. See *Cates v. Cates*, 619 N.E.2d 715, 717 (Ill. 1993) (“‘[D]ictum’ . . . as a general rule is not binding as authority or precedent within the *stare decisis* rule.”). Horizontal stare decisis, which considers the related question of whether and when a court must follow its own precedents, is more complex, and is beyond the scope of this article.

3. See David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715, 727–28 (2007) (noting that courts sometimes treat dicta “almost like holdings”); see also Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L. REV. (forthcoming 2010) (“lawyers and judges regularly treat dicta like a case’s holding”). This treatment is reflected in the formal position of various courts on the persuasiveness of a higher court’s dicta. See, e.g., *Cates*, 619 N.E.2d at 717 (“[A]n expression of opinion upon a point in a case

frequently cited as the sole support for a lower court's ruling.<sup>4</sup> At the extremes, some courts treat dicta as formally binding,<sup>5</sup> while others dismiss dicta outright.<sup>6</sup>

Because dicta can, in practice, range from binding to wholly unpersuasive, the formalistic categories of holding and dicta require more exacting scrutiny.<sup>7</sup> Approaching the issue from a pragmatic

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argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if dictum, is a judicial dictum. . . . [A] judicial dictum is entitled to much weight, and should be followed unless found to be erroneous.”); *City of Fresno v. Super. Ct.*, 82 Cal. App. 3d 191, 194 (1978) (“Dicta may be highly persuasive, particularly where made by the Supreme Court after that court has considered the issue and deliberately made pronouncements thereon intended for the guidance of the lower court upon further proceedings.”).

4. *See, e.g.*, *Doan v. Carter*, 548 F.3d 449, 458 (6th Cir. 2009) (rejecting petitioner's Confrontation Clause challenge to the admission of certain out-of-court statements by declaring such statements non-testimonial, citing as its sole support dicta from *Giles v. California*, 128 S. Ct. 2678, 2682–83 (2008)).

5. Some courts declare themselves bound by statements made in dicta, proclaiming that dicta “should be followed in the absence of some cogent reason for departing therefrom.” *State v. Fahringer*, 666 P.2d 514, 515 (Ariz. Ct. App. 1983).

6. Courts sometimes employ this method of argument in a questionable manner. Countless examples abound in the case law. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting) (accusing the majority of “misdescribing [the holdings of various] post-*Miranda* cases as mere dicta”). *See also* *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 296 (1995) (Thomas, J., dissenting) (“The doctrine [of stare decisis] would not require us to follow *Southland's* suggestion that § 2 requires the specific enforcement of the arbitration agreements that it covers. We accord no precedential weight to mere dicta, and this latter suggestion was wholly unnecessary to the decision in *Southland.*”); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 540 (1993) (Souter, J., dissenting)

(“[T]he Court's opinion destroys a framework carefully crafted in [binding] precedents as old as 20 years, which the Court attempts to deflect, but not to confront. The majority first contends that the opinions creating and refining the McDonnell Douglas framework consist primarily of dicta, whose bearing on the issue we consider today presumably can be ignored. But this readiness to disclaim the Court's considered pronouncements devalues them. Cases, such as McDonnell Douglas, that set forth an order of proof necessarily go beyond the minimum necessary to settle the narrow dispute presented, but evidentiary frameworks set up in this manner are not for that reason subject to summary dismissal in later cases as products of mere dicta.”).

7. Various commentators have identified this core concern. *See, e.g.*, *Dictum Revisited*, 4 STAN. L. REV. 509, 511 (1952) (“Since both definition and generalization from examples lead nowhere in an attempt to grasp the nature of dictum, the pragmatic method alone remains. . . . Discovery of what effect a dictum has in practice may provide a handle for its use.”). *See also* Shawn J. Bayern, *Case Interpretation*, 36 FLA. ST. U. L. REV. 125, 136 (2009)

(“My central argument is that distinctions between holding and dicta amount to bright-line rules to [determine the rule, standard, or principle the case was meant to stand for] formalistically and that, in so doing, they have led commentators to make certain unwarranted assumptions about [case] precedents . . . . In particular, any given statement in an opinion is assumed to be entirely precedential or entirely not.

perspective,<sup>8</sup> and building upon the work of prominent legal realists,<sup>9</sup> this article identifies three pragmatic categories of dicta: “vibrant dicta,” “dead dicta,” and “divergent dicta.”

Dicta is “vibrant” when the otherwise non-binding judicial pronouncement promptly flowers into law. Dicta can be converted to law either by the court that issues the dicta, or by the accumulation of rulings from other courts. Vibrant dicta of the latter type is exemplified by the nearly uniform treatment of dictum in *Florida v. J.L.*,<sup>10</sup> a Supreme Court opinion holding that an anonymous telephone tip, by itself, does not provide sufficient suspicion to stop or frisk a person suspected of carrying an unlawful firearm.<sup>11</sup> After issuing its ruling on the narrow issue before it, the J.L. Court closed its opinion by hypothesizing about whether an extreme public danger might alter the outcome in otherwise identical circumstances.<sup>12</sup> Following J.L.’s

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But in reality, . . . courts often do (and should) take middle-ground positions . . .”); Dorf, *supra* note 1, at 2013 (suggesting that “the holding/dictum distinction [may] oversimplif[y] matters by substituting a sharp dichotomy for a multidimensional spectrum running from narrow statements closely tied to the facts of the case [which are clear examples of case holdings] to completely unrelated speculation [which are clear examples of dictum]”); Thomas L. Fowler,  *Holding, Dictum . . . Whatever*, 25 N.C. CENT. L. REV. 139, 140 (2003) (suggesting that “under current practice, statements in appellate opinions are valued along a continuum rather than divided into the two classes . . . [of] binding . . . holdings; and . . . statements that can be, but need not be, followed, i.e., dicta”).

8. See *Dictum Revisited*, *supra* note 7, at 512 (“The epistemological method of pragmatism is to determine the nature of a concept from the effects it has [in practice].”).

9. See *infra* note 79 and accompanying text.

10. 529 U.S. 266 (2000). This particular example is discussed at length in Melanie D. Wilson, *Since When is Dicta Enough to Trump Fourth Amendment Rights? The Aftermath of Florida v. J.L.*, 31 OHIO N.U. L. REV. 211 (2005) (*passim*).

11. The *J.L.* ruling is notably consistent with prior Supreme Court precedent, including *Alabama v. White*, which held that an anonymous tip alone is seldom sufficient to establish reasonable suspicion to stop or frisk, but that there are situations in which an anonymous tip, if suitably corroborated by the police, exhibits “sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.” *Alabama v. White*, 496 U.S. 325, 329–32 (1990). Because the police in *J.L.* had not corroborated the substance of the anonymous tip in the manner conducted in *White*, the *J.L.* Court distinguished *White* on those grounds. See *J.L.*, 529 U.S. at 270–71.

12. *Id.* at 273–74. See *infra* notes 123–132 and accompanying text. One type of dictum is “an assertion in a court’s opinion of a proposition of law which does not explain why the court’s judgment goes in favor of the winner. If the court’s judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition . . . is superfluous to the decision and is dictum . . . consist[ing] essentially of a comment on how the court would decide some other, different case. . . .” Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256–57 (2006). The *J.L.* dictum falls within this category. See also CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 113 (4th ed. 2002) (noting that when a court discusses how its rule of decision would apply to facts other than those presented in the dispute before it, the passage is dicta).

suggestion, lower courts have consistently turned the J.L. dictum into law,<sup>3</sup> and have often invoked the J.L. dictum as justification for doing so.<sup>13</sup>

At the opposite end of the spectrum is “dead dicta.” As with vibrant dicta, two types of dead dicta exist. The first type involves dictum that has died through the issuing court’s explicit pronouncements.<sup>14</sup> This type of dead dicta can be seen in *United States v. Salerno*,<sup>15</sup> in which the Supreme Court rejected the argument, based upon dicta from one of its prior cases,<sup>16</sup> that the Eighth Amendment provides a right to bail premised solely upon considerations of flight.<sup>17</sup> *Salerno* was issued over twenty years ago, and since that time the dictum buried by *Salerno* has remained in its grave. The second type of dead dicta involves dictum that has died implicitly through a series of unfavorable rulings. This type is exemplified by the lower courts’ treatment of dictum from *Bartkus v. Illinois*,<sup>18</sup> in which the Supreme Court noted a possible double jeopardy concern in the event one sovereign acts as the “mere puppet” of another.<sup>19</sup> Despite the *Bartkus* Court’s warning, its proposed exception was rejected by many courts as the product of “mere dicta,”<sup>20</sup> and has been narrowly interpreted by most others.<sup>21</sup>

Finally, there is “divergent dicta.” Neither vibrant nor dead, this type of dicta does not promptly flower into law in the manner of

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13. See, e.g., *United States v. Elston*, 479 F.3d 314, 319 (4th Cir. 2007) (distinguishing *J.L.* on the grounds that the 911 caller reported an individual expressly threatening to shoot someone, and declaring, “in *J.L.*, the Supreme Court went out of its way to distinguish the hypothetical situation in which an anonymous caller reports an urgent danger to the community, acknowledging that such compelling circumstances could render reasonable a detention that might otherwise be impermissible”).

14. When a court wishes to explicitly declare dicta non-binding, the court often labels the passage “mere dicta.” See, e.g., *Johnson v. Bd. of Regents of Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1369 (S.D. Ga. 2000), *aff’d sub nom. Johnson*, 263 F.3d 1234 (“[Justice] Powell’s view as to the validity of a ‘Harvard-style’ admissions system was mere dicta and not a holding in any event, since *Bakke* concerned a dual-track program rather than a ‘plus factor’ program like Harvard’s or UGA’s.”). See also *Dictum Revisited*, *supra* note 7, at 509 (“A statement of the law that conflicts with the view of a judge or an attorney may be decisive unless it can be avoided. Labeling the statement a dictum is one simple means of evasion.”).

15. 481 U.S. 739, 752–53 (1987).

16. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

17. See *infra* notes 141–145 and accompanying text.

18. 359 U.S. 121, 123–24 (1959).

19. This phrase was used by the Seventh Circuit Court of Appeals to describe the nature of the sham exception. *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997).

20. See *infra* note 157.

21. See *infra* note 158.

vibrant dicta, nor is it dismissed outright. Given its ambiguity and questionable persuasiveness, divergent dictum prompts scholarly commentary and lower court development of the issue discussed in dicta. Divergent dictum is often marked by disagreement as to the dictum's persuasiveness and effect. The recent case, *Giles v. California*, is illustrative. In *Giles*, the Supreme Court noted the possibility of a specialized forfeiture-by-wrongdoing rule for domestic abuse cases.<sup>22</sup> As in *J.L.*, the *Giles* dictum is included at the end of the Court's opinion, and is not necessary to resolve the decided issue.<sup>23</sup> Despite this similarity, and in contrast to the near uniform approval of the *J.L.* dictum, lower courts wrestling with the *Giles* dictum have reached startlingly diverse conclusions as to its meaning and effect.<sup>24</sup>

Given the similarities between the *J.L.* and *Giles* dictum, their differing treatment signals a need to examine why some dicta are uniformly accepted while others are not. This article engages in that endeavor. By comparing examples from each dicta category, this article identifies five factors that influence the path of a particular dictum: (1) the number of judges that endorsed the dictum; (2) the depth of the issuing court's discussion of the dictum; (3) whether the dictum clarifies a line of demarcation in existing case law; (4) the relationship between the facts of the case and the statements made in dictum; and (5) the extent to which the issuing court stands by the pronouncements made in dictum.

Part II of this article examines the traditional definitions of holding and dicta, and highlights the need for refinement of that distinction. Part III discusses the prevalence of dicta-planting, arguing that judges sometimes utilize dicta to influence issues not yet before the court. Part IV provides examples of each pragmatic category of dicta: dead dicta, vibrant dicta, and divergent dicta. Part V examines factors that determine whether a statement made in dictum will become the law. Part VI concludes.

## II. DICTA DEFINED

Generally speaking, case holdings are binding upon future

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22. See *Giles*, 128 S.Ct. at 2693.

23. While some courts have characterized the disputed *Giles* statements as part of the case holding, they are more properly classified as dicta. See *infra* note 186.

24. See *infra* notes 197–215 and accompanying text.

courts,<sup>25</sup> while dicta are not.<sup>26</sup> Given this distinction, isolating a case holding from its dicta is critical.

According to the traditional view, dicta include “statement[s] in an opinion not necessary to the decision of the case;”<sup>27</sup> holdings, on the other hand, are statements actually necessary to decide the issue between the parties.<sup>28</sup> While this distinction is a useful starting point, distinguishing a case holding from its dicta has proven difficult in practice.<sup>29</sup>

The traditional definition of dicta is unhelpful for a number of reasons. First, the definition fails to account for the range of dicta types. While statements unnecessary to support a court’s decision are one type of dicta, several additional types of dicta exist, including statements necessary to support a decision but serving as only a minor premise in the argument, statements that represent alternative grounds for a decision, and overly-broad reasoning.<sup>30</sup>

Second, even within the class of statements “not necessary to support the decision,” courts sometimes draw further distinctions

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25. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994) (“It is to the holdings of our cases, rather than their dicta, that we must attend . . .”).

26. *Humphrey’s Executor v. United States*, 295 U.S. 602, 627 (1935) (“dicta . . . may be followed if sufficiently persuasive but [they] are not controlling”).

27. See *Dictum Revisited*, *supra* note 7, at 509. See also *Dorf*, *supra* note 1, at 2000 (citing *Humphrey’s Executor v. United States*, 295 U.S. 602, 627 (1935) (noting that “general expressions” should not be controlling in subsequent suits); *Doughty v. Underwriters at Lloyd’s, London*, 6 F.3d 856, 861 (1st Cir. 1993) (“‘Dictum’ is a term that judges and lawyers use to describe comments relevant, but not essential, to the disposition of legal questions pending before a court”).

28. RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 19 (1961) (“the only ‘binding’ aspect of a case is . . . that part of it, called the *ratio decidendi*, which is considered to have been necessary to the decision of the actual issue between the litigants”); *Bayern*, *supra* note 7, at 129 (discussing the ambiguity in the terms “dicta” and “holding,” and concluding that despite the ambiguities, “[t]he principal feature of holdings is that they are necessary to decide a case, and the principal feature of dicta is that they are not”).

29. ROBERT E. KEETON, *VENTURING TO DO JUSTICE* 33–34 (1969) (noting the difficulty in precisely defining case holdings). This article does not attempt to develop comprehensive definitions of these two terms. Scholars have addressed this particular topic, and the literature in this area is interesting and instructive. See generally *Dorf*, *supra* note 1. See also Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 *STAN. L. REV.* 953 (2005). Recognizing the ambiguities inherent in these terms, and attempting to fashion an overarching definition of “dicta”, Professors Abramowicz and Stearns have proposed the following definition: “A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta.” *Id.* at 961.

30. See *Dictum Revisited*, *supra* note 7, at 515 (setting forth a collection of policies in the law of precedent encompassed within the term “dicta”).

within the more particular subset of statements addressing issues beyond those resolved in the case.<sup>31</sup> While courts generally agree that such statements are not technically binding,<sup>32</sup> some courts, but only a minority, distinguish between “judicial dicta” and “obiter dicta.”<sup>33</sup> “Obiter dicta” involve points neither argued by the parties nor deliberately passed upon by the court;<sup>34</sup> these statements often originate with the writing judge.<sup>35</sup> Obiter dicta generally have no persuasive influence.<sup>36</sup> “Judicial dicta,” on the other hand, are the product of a more comprehensive discussion of legal issues, and usually involve points briefed and argued by the parties.<sup>37</sup> Judicial

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31. There is universal agreement that “[a] judge’s power to bind is limited to the issue that is before him,” *United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring), and that statements addressing issues not actually before the court do not carry the force of law. *United States Supreme Court Justice John Marshall*, writing in 1821, elaborated upon this principle in *Cohens v. Virginia*:

[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. 19 U.S. 264, 399–400 (1821).

32. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (“The [argument at issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point.”); *People v. Concepcion*, 193 P.3d 1172, 1176 n.7 (Cal. 2008) (“An appellate decision is authority only for the points actually involved and decided.”). *See also* KARL N. LLEWELLYN, *THE BRAMBLE BUSH*, at 40–41 (1996) (“[w]hen [a court] speaks to the question before it, it announces *law* . . . . But when it speaks to any other question . . . no [court] needs to follow. . . . We know [such words] as . . . *dicta*.”).

33. *See* Robert G. Scofield, *The Distinction Between Judicial Dicta and Obiter Dicta*, 25 L.A. LAW. 17 (Oct. 2002) (illustrating, through case examples, that the failure of some judges to understand the distinction between judicial dicta and obiter dicta has led to confusion in case law).

34. *See Nudell v. Forest Preserve Dist. of Cook Cty.*, 799 N.E.2d 260, 264 (Ill. 2003) (“[O]biter dictum . . . means a remark or opinion uttered by the way. Such an expression or opinion as a general rule is not binding . . . .”).

35. *Chance v. Guar. Trust Co. of N.Y.*, 298 N.Y.S. 17, 22 (N.Y. Sup. Ct. 1937) (describing obiter dictum as “an expression originating alone with the judge writing the opinion, as an argument or illustration”).

36. *See* KARL N. LLEWELLYN, *THE BRAMBLE BUSH*, 46 (1996) (“One of the reasons . . . often given for weighing dicta lightly, is that the background and consequences of the statement have not been illumined by the argument of counsel, have not received . . . the full consideration of the court”).

37. *West Virginia Dept. of Transp. v. Parkersburg Inn, Inc.*, 671 S.E.2d 693, 699 n.6 (W.Va. 2008) (“Dicta normally comes in two varieties: obiter dicta and judicial dicta. Obiter dicta are comments in a judicial opinion that are unnecessary to the disposition of the case. Judicial dicta are comments in a judicial opinion that are unnecessary to the disposition of the

dicta are often treated more persuasively than obiter dicta, although neither type of statement is controlling.<sup>38</sup>

While the obiter dicta/judicial dicta distinction is helpful in dissecting dicta along pragmatic lines, the distinction alone cannot account for broader trends in the handling of a particular dictum. Many courts, for example, do not follow this traditional distinction.<sup>39</sup> In addition, the thoroughness of a court's discussion of an issue not essential to the case is just one of many factors in determining a dictum's persuasiveness, and this factor is often outweighed by other considerations.

A third flaw in the traditional definition of dicta is its failure to account for a case rationale. Dicta traditionally include statements "not necessary to support [a] decision,"<sup>40</sup> but determining a particular statement's necessity is often difficult. Under a strict interpretation, the only statement truly necessary to decide a case is the order of the court, which potentially makes the entire opinion dicta.<sup>41</sup> Under a broad interpretation, nearly all statements in support of a court's ultimate conclusion would not be deemed dicta.<sup>42</sup> Under this broader view, the court's reasoning could be deemed binding.<sup>43</sup> This is

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case, but involve an issue briefed and argued by the parties.") (quoting *People v. Williams*, 788 N.E.2d 1126, 1136 (Ill. 2003)).

38. See *Cates v. Cates*, 619 N.E.2d 715, 717 (1993) ("an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if dictum, is a judicial dictum . . . a judicial dictum is entitled to much weight, and should be followed unless found to be erroneous"). See also *Stark v. Watson*, 359 P.2d 191, 196 (Okla. 1961) ("[T]here is a wide difference between [judicial dictum and obiter dictum]. Judicial dictum, while not binding on the court at a later date, is highly persuasive and should be given greater weight than obiter dictum").

39. See *Scofield*, *supra* note 33.

40. *Dorf*, *supra* note 1, at 2000 (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) (noting that "general expressions" should not be controlling in subsequent suits)).

41. *Dictum Revisited*, *supra* note 7, at 509 ("The traditional view is that a dictum is a statement in an opinion not necessary to the decision of the case. This means nothing. The only statement in an appellate opinion strictly necessary to the decision of the case is the order of the court."); See also CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 113 (3rd ed. 1998) ("Narrowly defined, a 'holding' is the court's resolution of an issue before it, limited to the material facts of that dispute.").

42. See generally, *Dictum Revisited*, *supra* note 7. Under the narrow reading identified above, the word "support" is used in its strictest sense, not as a justification for the case outcome but as reference to a simple assertion of authority. Under the broader reading, by contrast, the word "support" describes the justification of a case outcome through logical argument.

43. See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 645-51 (1995) (arguing that courts are bound not only by the outcomes of previous cases, but also by the



especially true where eliminating a particular rationale would leave a case outcome unsupported by logic, which runs counter to conventional appellate decision-making.<sup>44</sup>

Consistent with these competing approaches, scholars present differing articulations of the case holding.<sup>45</sup> Some believe the holding should include a case rationale, a view referred to as the “rationale-based” approach.<sup>46</sup> Others advocate a narrower view, arguing that the holding encompasses only the facts and outcome of the case. Under the “facts-plus-outcome” approach, everything else in the opinion, including any reasoning or justification, even if necessary to the result, is dicta.<sup>47</sup> A third approach does not include the rationale within a case holding, but deems the rationale binding nonetheless.<sup>48</sup>

*Ake v. Oklahoma*<sup>49</sup> exemplifies the problems courts confront when asked to determine the persuasive value of a court’s rationale. In *Ake*, defendant Glen Ake was charged with capital murder, and was diagnosed as a probable paranoid schizophrenic.<sup>50</sup> Intending to

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reasons or propositions that generate and directly support the earlier result).

44. *Id.* at 633 (“The conventional picture of legal decision making, with the appellate opinion as its archetype and reasoned elaboration as its credo, is one in which giving reasons is both the norm and the ideal. Results unaccompanied by reasons are typically castigated as deficient on precisely those grounds.”); *see also* Bayern, *supra* note 7, at 135 (“Courts, [unlike legislatures], are ordinarily understood as being required to express reasons for what they do.”).

45. *See* Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 MINN. L. REV. 612, 638–39 (2006) (discussing the contrasting approaches of the facts-plus-outcome and rationale-based case holdings); *see also* Stinson, *supra* note 3, at 5–6 (same).

46. *See* Dorf, *supra* note 1, at 2040. Professor Mel Eisenberg, in his book, *THE NATURE OF THE COMMON LAW*, declares that “the rule of a precedent consists of the rule it states, provided that rule is relevant to the issues raised by the dispute before the court.” MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 55 (1988) (Eisenberg approach could encompass rather broad rule statements such as those expressed in *Ake v. Oklahoma*, 470 U.S. 68 (1985)).

47. *See* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 162 (1930-31). *See also* Ruggero J. Aldisert, *Precedent: What It Is and What It Isn’t: When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 607 (1990) (“[A] case is important only for what it decides: for ‘the what,’ not for ‘the why,’ and not for ‘the how.’”); Bayern, *supra* note 7, at 131-32 (describing the facts-plus-outcome approach as one of three approaches to the holding/dicta distinction, and noting that this approach is “taught less widely to students today”); MORRIS L. COHEN *ET AL.*, *HOW TO FIND THE LAW* 16 (9th ed. 1989) (“The holding is limited to the decision and the significant or material facts upon which the court necessarily relied in arriving at its determination. Everything else is dicta and therefore not binding.”).

48. *See infra* notes 67-79 and accompanying text.

49. 470 U.S. 68 (1985).

50. *Id.* at 70–71. Additional facts regarding Ake’s crime can be found in Justice Rehnquist’s dissent at page 88 of the opinion.

raise the insanity defense, Ake's counsel requested funds to hire a psychiatrist so that Ake could be examined with respect to his mental condition at the time of the offense—the critical time for assessing an insanity claim.<sup>51</sup> The court denied the motion.<sup>52</sup> As a result, no psychiatrist testified as to Ake's mental condition at the time of the offense because no expert had examined him on that point.<sup>53</sup> Despite this lack of testimony, the jury was instructed to presume Ake's sanity unless he presented evidence to create a reasonable doubt about his sanity at the time of the killing.<sup>54</sup>

Rejecting Ake's insanity claim, the jury convicted Ake and sentenced him to death.<sup>55</sup> The United States Supreme Court reversed,<sup>56</sup> holding that “when a[n] [indigent] defendant demonstrates . . . that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist.”<sup>57</sup>

While Ake's explicit holding appears confined to claims of insanity, Ake's reasoning is incredibly broad. According to the Court, as a component of due process, “fundamental fairness entitles indigent defendants to ‘an adequate opportunity to present their claims fairly within the adversary system.’”<sup>58</sup> That principle, in turn, requires states to provide the “basic tools of an adequate defense or appeal” to defendants unable to afford them.<sup>59</sup>

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51. *Id.* at 72 (“During Ake's 3-month stay at the state hospital, no inquiry had been made into his sanity at the time of the offense, and, as an indigent, Ake could not afford to pay for a psychiatrist.”).

52. *Id.* In denying the motion, the “trial court explicitly rejected counsel's argument that the Federal Constitution requires that an indigent defendant receive the assistance of a psychiatrist when that assistance is necessary to the defense.”

53. *Id.*

54. *Id.* at 72–73.

55. *Id.* at 73. No new evidence was presented at sentencing. To establish the likelihood of Ake's future dangerous behavior, the prosecutor relied upon the testimony of the state psychiatrists who had testified at the guilt phase that Ake was dangerous to society. Ake had no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation.

56. *Id.* at 74. On appeal, the United States Supreme Court specifically considered “whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.” *Id.* at 70.

<sup>57</sup> *Id.* at 83.

58. *Id.* at 77 (citation omitted).

59. *Id.* at 77 (quoting *Britt v. North Carolina*, 404 U.S. 226, 277 (1971)). *Ake* cited a variety of cases to establish the general principle requiring states, as a matter of due process, to provide indigent defendants with “the raw materials integral to the building of an effective defense.” *Id.* The Court cited *Griffin v. Illinois*, 351 U.S. 12, 76 (1956), which mandates

Applying its broad, “basic tools” rationale, the Court deemed “the assistance of a psychiatrist . . . crucial to the defendant’s ability to marshal [an insanity] defense.”<sup>60</sup> To justify this outcome, the Court emphasized the critical role of the psychiatrist in accurately assessing insanity claims, thereby providing a narrower, more case-specific rationale.<sup>61</sup>

The tension between Ake’s narrow “facts-plus-outcome” holding and its extremely broad principles has generated disagreement regarding the scope of the Ake right,<sup>62</sup> particularly as it relates to non-capital cases<sup>63</sup> and non-psychiatric witnesses.<sup>64</sup> In those instances, the analysis turns on whether Ake’s broad rationale is classified as binding, as highly persuasive judicial dicta, or as unpersuasive obiter dicta.

Considering the alternative articulations of the case holding — which require consideration of Ake’s material facts, its outcome, and

provision of a free trial transcript to indigent defendants for certain appeals. *Id.* at 76. The Court cited to another case, establishing that indigent defendants are not required to pay a fee before filing a notice of appeal. *Id.* (citing *Burns v. Ohio*, 360 U.S. 252 (1959)). In a third example, the Court noted the established rules that indigent defendants are entitled to the assistance of counsel, both at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); and on his first direct appeal as of right, *Douglas v. California*, 372 U.S. 353 (1963). *Id.* Finally, the Court cited *Little v. Streater*, 452 U.S. 1 (1981), which establishes that, in a paternity action, the State cannot deny the putative father blood grouping tests, if he cannot otherwise afford them. *Id.* In the Court’s words, “[m]eaningful access to justice has been the consistent theme of these cases.” *Id.* at 77.

60. *Ake*, 470 U.S. at 80.

61. According to the Court, “psychiatrists gather facts . . . ; they . . . draw plausible conclusions . . . about the effects of any [mental] disorder on behavior; and they offer opinions about how the defendant’s mental condition might have affected his behavior at the time in question,” all of which “assist[s] lay jurors . . . to make a sensible and educated determination about the [insanity claim]. . . .” *Id.* at 80–81.

62. *Id.* at 82. See Emily J. Groendyke, *Ake v. Oklahoma, Proposals for Making the Right a Reality*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 367, 372–73 (2007) (noting that “[t]he opinion in *Ake* lacked guidance on what its holding should mean or how it should function,” including “doubt as to whether the holding applies to other types of experts,” and “whether the provision of experts applied to all criminal defendants, or . . . only to those facing death”).

63. Most courts addressing this question have concluded that *Ake* applies to non-capital cases. See *Moore v. State*, 889 A.2d 325, 336–37 (Md. 2005) (citing a series of cases). Some courts, however, have limited application of *Ake* to capital cases. See, e.g., *Isom v. State*, 488 So.2d 12, 13 (Ala. Crim. App. 1986); *Bannister v. State*, 726 S.W.2d 821, 827–28 (Mo. Ct. App. 1987).

64. See *Moore*, 889 A.2d at 337–38 (citing a series of cases applying the *Ake* right to non-psychiatric experts). See generally Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L.REV. 1305 (2004); Michelle Willis, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-Ake Criminal Justice System*, 37 EMORY L.J. 995 (1988).

its rationale — the critical facts of the case are that: (i) Ake was subject to a death sentence; (ii) Ake’s sole defense during the guilt phase was insanity; (iii) Ake had sufficiently identified his sanity as a significant factor at trial; and (iv) not a single expert examined Ake regarding his sanity at the time of the offense. The outcome is that due process mandates assistance of at least one expert witness under such circumstances. Ake’s rationale can be broadly or narrowly stated. Broadly, Ake’s rationale is that due process requires states to provide indigent defendants the “basic tools of an adequate defense or appeal,” reasoning that readily accommodates other types of experts. More narrowly, Ake’s rationale is that psychiatric assistance is necessary to enable meaningful assessment of an insanity claim, particularly in capital cases.

At one extreme, a case holding that encompasses only Ake’s facts and outcome would leave courts free to disregard Ake’s sweeping rationale, and would enable courts to limit Ake to insanity claims.<sup>65</sup> Because the facts of Ake are truly unique, choosing to read Ake’s holding narrowly would permit courts to dismiss nearly every Ake-based claim.<sup>66</sup>

At the other extreme, Ake’s broad “basic tools” rationale can reasonably be deemed binding, either as part of the *ratio decidendi*, defined as the rule of law on which the court’s decision is founded,<sup>67</sup> or as an otherwise binding aspect of the case.

Ake’s statement that states must provide the “basic tools of an adequate defense or appeal” for all indigent criminal defendants is, arguably, Ake’s *ratio decidendi*.<sup>68</sup> Further, even if this rationale is not

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65. See *Ake*, 470 U.S. at 77 (holding that “[i]n this case we must decide whether. . .the participation of a psychiatrist is important enough. . .to require the state to provide an indigent defendant with access”).

66. See Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 MINN. L. REV. 612, 638–39 (2006) (“[One] formulation [of dicta] focuses on the facts and the outcome in the precedent case, and asks which facts were material to the decision. According to this view, elaborations of legal principle that are broader than the narrowest proposition that could have decided the case given its particular facts are considered dicta. Although frequently deployed in practice, this formulation of the distinction between holdings and dicta has serious potential for judicial manipulation to serve instrumentalist ends . . .”).

67. *Ratio decidendi* is Latin for “the reason for deciding.” It is defined as “[t]he principle or rule of law on which a court’s decision is founded.” BLACK’S LAW DICTIONARY 13761015 (9th ed. 2009).

68. Professor Richard A. Wasserstrom has noted that, for any given case: “we can derive a parallel series of corresponding propositions of law, each more and more generalized as we recede farther and farther from the instant state of facts and include more and more fact situations in the successive groupings” and that, “[a]s a consequence, . . . [a]ny

part of Ake's ratio decidendi, it may still be deemed binding. The United States Supreme Court, in *Seminole Tribe of Florida v. Florida*, deemed itself "bound" by the "well-established rationale upon which the Court based the results of its earlier decisions."<sup>69</sup> The "well-established rationale" referenced in *Seminole Tribe* is the broad principle underlying the Eleventh Amendment preventing congressional authorization of suits by private parties against non-consenting States,<sup>70</sup> a principle denoted as "the background principle of state sovereign immunity embodied in the Eleventh Amendment."<sup>71</sup> The principle underlying Ake — that due process requires provision of the "basic tools of an adequate defense" — shares critical similarities with its *Seminole Tribe* counterpart. Like the "well-established rationale" in *Seminole Tribe*, Ake's broad rhetoric is generated from the core reasoning of various Supreme Court precedents,<sup>72</sup> making the Ake rationale similarly "well-established." Moreover, like the *Seminole Tribe* rationale, a bedrock

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rule of law can be derived from the holding and opinion of the prior case, and this rule is as properly the ratio decidendi as is any other rule." RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 19 (1961) (quoting Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 72 (1928)). According to Wasserstrom, because of this phenomenon, "[t]he earlier case can have only the meaning that the judge in the later case wants it to have." *Id.*

69. 517 U.S. 44, 66-67 (1996). On the issue of how to treat alternative grounds for a decision, or multiple sufficient rationales, the Supreme Court has declared, "[w]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949). Thus, alternative rationales are treated, at a minimum, as highly-persuasive judicial dicta, which reflects the traditional approach for alternative grounds. *Dictum Revisited*, *supra* note 7, at 511-31. *See also* *Smith v. Patrick*, 508 F.3d 1256, 1260 (9th Cir. 2007), *vacated on other grounds sub nom. Patrick v. Smith*, 130 S. Ct. 1134 (2010) (in determining a Supreme Court holding for purposes of applying 28 U.S.C. § 2254(d), which permits *habeas corpus* relief only upon a showing that a state court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" — "[t]he Court's 'holding' . . . refers not only to the result reached, but also the rationale necessary to the reaching of that result."). *But see* *Local 28 of Sheet Metal Workers Intern. Ass'n v. EEOC*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring) ("Although technically dicta, . . . an important part of the Court's rationale for the result that it reach[es] . . . is entitled to greater weight . . .").

70. *Seminole Tribe of Florida*, 517 U.S. at 71. In *Seminole Tribe*, the Court declared that even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment nevertheless prevents Congress to authorize suits by private parties against unconsenting states. *See id.* at 72.

71. *Id.*

72. The *Ake* Court, for example, cited to *Ross v. Moffitt*, 417 U.S. 600 (1975), and to *Britt v. North Carolina*, 404 U.S. 226 (1971), in order to establish that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system." *Ake*, 470 U.S. at 77.

principle underlying the Eleventh Amendment, Ake's broad rhetoric can be characterized as a foundational principle underlying Ake's corresponding constitutional right.

Given the similarities between Ake and Seminole Tribe, post-Ake courts could reasonably invoke Ake's broadly-worded principles as the basis for extending the Ake right to other defenses and non-psychiatric expert witnesses. Most courts considering Ake-based claims have taken this approach,<sup>73</sup> and the Supreme Court itself declared Ake's broad rhetoric central to the Ake holding.<sup>74</sup> Even under that view, however, adoption of Ake's broad rhetoric still requires each post-Ake claimant to demonstrate that any particular requested expert is such a "basic tool" of an effective defense.<sup>75</sup>

The ambiguity of Ake's holding is demonstrated by *Moore v. Kemp*,<sup>76</sup> an en banc decision of the United States Court of Appeals for the Eleventh Circuit involving a request for non-psychiatric assistance. *Moore* contains three opinions, each presenting separate approaches to the Ake claim, with one opinion explicitly limiting Ake to insanity claims and another opinion extending Ake to other experts.<sup>77</sup>

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73. See *Ex Parte Moody*, 684 So.2d 114, 119 (Ala. 1996) ("Most courts considering whether to apply *Ake* to nonpsychiatric experts have held that where an indigent defendant has established a substantial need for an expert, without which the fundamental fairness of the trial will be questioned, *Ake* requires the appointment of an expert regardless of his field of expertise, even a nonpsychiatric expert.")

74. In *Medina v. California*, the Court noted that "the holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding.'" 505 U.S. 437, 444-45 (1992).

75. Even when the broad *Ake* rhetoric is deemed controlling, when *Ake* is invoked, the court must still analyze whether the particular requested expert is actually "integral to the building of an effective defense," *Ake*, 470 U.S. at 77, as only those circumstances trigger due process concerns. See, e.g., *Washington v. State*, 836 P.2d 673 (Okla. Crim. App. 1992) (majority and dissent each applied *Ake* to requests for non-psychiatric experts, but reached different results regarding *Ake*'s application). See also *Moore*, 889 A.2d at 339 ("*Ake* does not mandate handing over the State's checkbook to indigent defendants and their attorneys. The Supreme Court reiterated that it has never 'held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy,' but had rather 'focused on identifying the 'basic tools of an adequate defense or appeal.'" (internal citations omitted).

76. 809 F.2d 702 (11th Cir. 1987) (en banc).

77. The majority opinion assumed, for sake of argument, that the due process clause could require states to provide non-psychiatric expert assistance, *id.* at 711-12, but rejected the *Ake* claim on the merits. *Id.* at 718. The concurring opinion characterized *Ake* as a "narrow holding premised upon the peculiar role psychiatric testimony necessarily plays in the

As Moore illustrates, *Ake*'s broad reasoning can be classified as binding, as particularly persuasive judicial dicta, or as non-binding obiter dicta.<sup>78</sup> For that reason, whether and to what extent *Ake* is expanded depends upon the views of each individual reviewing court. With such a malleable decision, each court considering an *Ake*-based claim is free to resolve the claim as the court desires, then justify its decision by interpreting *Ake* in a manner consistent with that desired outcome.<sup>79</sup> More importantly, as *Ake* reveals, the traditional

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assertion of an insanity defense," and categorically refused to apply *Ake* to non-psychiatric experts. *Id.* at 736–37 (Hill, J., concurring in the majority's resolution of the *Ake* issue). The final opinion stressed the "elastic" nature of the *Ake* rule, and concluded that the defendant "established a reasonable need for the assistance of [non-psychiatric] experts under *Ake*," thereby entitling the defendant to habeas relief. *Id.* at 741–42 & 746 (Johnson, J., dissenting from the majority's resolution of the *Ake* issue). According to this opinion, the Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), "belies the state's suggestion that *Ake* must be read narrowly and confined to its facts." *Id.* at 741.

78. A helpful comparison can be made in the context of requests for hypnosis experts. Consistent with the *Moore* concurrence, courts explicitly refusing to extend *Ake* to non-psychiatric experts have described the *Ake* holding narrowly. The Oklahoma Supreme Court effectively applied the facts-plus-outcome case holding definition of *Ake*, and rejected a defendant's request for a hypnosis expert. According to that court:

*Ake* holds that psychiatric assistance must be provided when: 1) the defendant's sanity is a pivotal issue, and 2) the defendant has met his burden of showing that his sanity is a factual question to be determined at trial. Even if, for the sake of argument, we were to find an analogy between providing key, psychiatric witnesses and other experts (which we do not), the defendant still has the threshold [sic] burden of showing there is pivotal, factual issue for which the testimony of an expert is necessary.

*Stafford v. Love*, 726 P.2d 894, 896 (Okla. 1986).

The *Stafford* court's narrow characterization of the *Ake* holding enabled it to sidestep the issue of whether the requested expert would have been "a basic tool" of *Stafford*'s defense and, consequently, whether denial of *Stafford*'s request rendered his trial fundamentally unfair. Adopting the alternative view, the United States Court of Appeals for the Eighth Circuit found error in a trial court's refusal to appoint a hypnosis expert. *Little v. Armontrout*, 835 F.2d 1240, 1243 (8th Cir. 1987). Squarely addressing *Ake*'s scope, the *Armontrout* court found "no principled way to distinguish between psychiatric and nonpsychiatric experts." *Id.* According to the court, "[t]he question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given." *Id.* For similar reasons, the court refused to "draw a decisive line for due process purposes between capital and noncapital cases." *Id.* Echoing *Ake*'s broad rationale, the *Armontrout* court believed "a defendant is 'at an unfair disadvantage if he is unable because of poverty to parry by his own [expert] witnesses the thrusts of those against him.'" *Id.* at 1244–45 (citing *Reilly v. Berry*, 166 N.E. 165, 167 (N.Y. 1929)). Employing this logic, the court believed the State should have provided the requested hypnosis expert. *Id.* at 1245.

79. A great deal of scholarship has been devoted to the types of factors that motivate judges in decision-making. Generations of scholars have observed, and I agree, that many legal disputes are not easily resolved by application of a clear legal rule. Rather, most cases present a range of outcomes that plausibly fit within the available precedents, and judges

distinction between holdings and dicta cannot determine the persuasive influence of a court's rationale. More is required to make such a determination, and the multi-factor approach set forth in Part V provides the needed framework.

### III. JUDICIAL DICTA-PLANTING

Appellate judges are careful writers, and are familiar with the principle opposing advisory opinions.<sup>80</sup> Yet passages that are obviously dicta appear throughout their opinions, particularly those addressing how the court might decide a different case. This begs the question of why so many opinions contain passages that could have

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choose from among those outcomes by employing a host of factors unrelated to the deductive or logical decision-making procedure. *See, e.g.*, BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 58-66 (1924) (identifying a minority of cases as "presenting a genuine opportunity for choice" between equally viable options, and identifying four primary "forces and methods" that govern the decision of the doubtful case as the force of logic or analogy; the force of history; the force of custom or tradition; and the force of justice, morals, and social welfare); H.L.A. Hart, *Problems of the Philosophy of Law* (1967), reprinted in M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 1569-71 (8th ed. Sweet & Maxwell 2008) (discussing the notion that judges make choices, and identifying various extrinsic considerations that factor into judicial decision-making, including "a wide variety of individual and social interests, social and political aims, and standards of morality and justice"); RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 19 (1961).

("[E]ven if it is assumed that there are relatively precise rules of law which the judge can apply, these can only be so applied once the case has been characterized as being a member of the class controlled by the rule. Thus, the decision . . . will depend not upon the particular rules of the legal system but rather upon the characterization which the judge makes of the particular fact situation. And, once more, since this process of characterization is not a logical or deductive procedure, it follows that the judge can characterize the fact situation any way he wishes in order to produce the desired result.");

JEROME FRANK, *LAW AND THE MODERN MIND* 106 (1930) (arguing that judges decide cases by first deciding upon a proper conclusion, then rationalizing the result by attempting to show that it derives from applicable legal rules, and that the decision-making process actually employed in any particular case depends upon the "peculiarly individual traits of the persons whose inferences and opinions are to be explained").

80. *See* *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("(T)he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, no abstractions' are requisite."); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 324 (1936) ("The judicial power does not extend to the determination of abstract questions"); *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999) (appellate courts "decide only actual controversies and avoid advisory opinions"); *Trahan v. State Highway Comm'n*, 151 So. 178, 183 (Miss. 1933) ("no court shall decide, or interfere in, any question unless and until a party having the right to relief in respect to that question is asking it of the court. A decision otherwise would be purely advisory, of no force, and would not be a precedent that would bind any person or court").



been easily deleted without altering the decision or its supporting logic.

While there are many possible explanations for the prevalence of dicta,<sup>81</sup> I argue that judges sometimes plant dicta into their opinions to subtly influence the law's development,<sup>82</sup> and that this practice will continue precisely because it is effective.<sup>83</sup> Judge Pierre N. Leval, a Second Circuit Court of Appeals judge, candidly addressed why judges "venture[] beyond the issue in controversy" in case opinions. Judge Leval notes a variety of humanistic explanations:

- (1) At times our exuberance for a point of view gets out of hand.
- (2) At times we may devise a strategic gambit in ideological warfare. We may reach beyond the case in order to preempt colleagues who might later decide a further issue in a manner not to our liking.
- (3) [I] further suggest[] that judges may at times . . . think, "I've looked at this stuff closely and I understand it. It will come out better if I cover these questions now, rather than leaving them to [future judges]." (4) We are tempted also by the seductive lure of establishing the landmark precedent . . . . We think the further we venture in the opinion, the more likely it is to achieve landmark status.<sup>84</sup>

Judge Leval describes "a strategic gambit in ideological warfare" designed "to preempt colleagues who might later decide a further

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81. See, e.g., Stinson, *supra* note 3, at 3-4 (noting that "[t]he Supreme Court sets broad policy, which invites espousing dicta," and that "[t]he Court also issues less than a hundred opinions each year and those opinions tend to be lengthy, allowing more space for extraneous commentary [or] dicta").

82. This is not a novel suggestion. Writing in 1950, Justice Frankfurter declared that with "progressive distortion," "a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision." *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting). Nearly 20 years later, Robert E. Keeton recognized that courts often engage in various techniques intended as "preparatory steps in a process of lawmaking to be consummated in later judicial action." Among the seven most common of these techniques, Keeton argued that courts often include "broad statements of reasons for decision," arguably consisting of obiter dicta rather than holdings, and that such statements "tend to be self-fulfilling prophecies, even if not binding as precedents, because they have some weight as considered expressions." According to Keeton, "[t]he common practice of including dicta of this type in opinions suggests a consensus that this is permissible judicial behavior." See ROBERT E. KEETON, *VENTURING TO DO JUSTICE* 30-31 (Harvard U. Press 1969). See also Leval, *supra* note 12, at 1268-69.

83. See *infra* Part IV for examples where dicta have promptly flowered into law.

84. Leval, *supra* note 12, at 1263-64.

issue [differently].”<sup>85</sup> Speaking from experience, Judge Leval notes that fellow judges do not carefully scrutinize statements made in dicta.<sup>86</sup> In light of those realities, judges have little to lose by the inclusion of dicta.

Not only do judges have little to lose by the use of dicta, they also have much to gain. Once a dictum has been planted, it is likely to achieve its desired effect. History shows that dicta are not lightly disregarded,<sup>87</sup> and that courts frequently cite to and rely upon dicta as support for their holdings.<sup>88</sup> The reason is obvious. Judges across all

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85. *Id.* at 1263.

86. Judge Leval notes that “peripheral observations, alternative explanations, and dicta will receive scant attention” from fellow judges. *Id.* at 1262. This is, however, not to say that judges are not careful writers and editors. Indeed, great care goes into the judicial opinion-writing process. While this is not a controversial assertion, Judge Charles R. Wilson of the United States Court of Appeals for the Eleventh Circuit has provided helpful insight into the opinion-writing process. Charles R. Wilson, *How Opinions are Developed in the United States Court of Appeals for the Eleventh Circuit*, 32 STETSON L. REV. 247 (2003). Judge Wilson begins by noting the multiple rounds of revision that occur within the writing judge’s chambers, a process that often involves “more than one law clerk” and editing by the writing judge. *Id.* at 265. According to Judge Wilson, once a draft opinion is finalized, the draft is circulated to the other judges on the panel for review. *Id.* at 266. Other panel members may then request revisions, and the process may repeat itself depending upon the extent of the requested revisions. *See id.* at 266-67. Judges not assigned to the particular panel may also review the opinion, and those judges may make further comments and suggestions. *Id.* at n.107 (describing the governing Eleventh Circuit procedure). Thus, before an opinion is published, the deciding judges and their clerks have “devote[d] a considerable amount of time and effort to the [drafting] task.” *Id.* at 268. *See also* Aldisert *et al.*, *Opinion Writing and Opinion Leaders*, 31 CARDOZO L. REV. 1, 19 (2009) (stressing the importance of careful opinion-writing, and noting that lower courts “stud[y] [appellate opinions] for future direction and seek[] materials that will form the grounds for future decisions”).

87. According to Frederick Schauer, “[p]recedential constraint permits courts to influence outcomes in future cases that they may now only dimly perceive. Reason-giving has the same potential.” Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 654 (1995). Robert E. Keeton has similarly argued that “courts customarily include obiter dicta in their opinions, and . . . [such passages] almost certainly will be transformed into a holding when the question next comes before the court.” *See* ROBERT E. KEETON, *VENTURING TO DO JUSTICE* 34 (1969).

88. *People v. Lozano*, 192 Cal. App. 3d 618, 632 (1987) exemplifies the prevailing view. According to the *Lozano* court, “[a] statement which does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed.” (citing B.E. WITKIN, *CAL. PROCEDURE* (3d ed. 1985) § 785 p. 756). *Doughty v. Underwriters at Lloyd’s, London*, 6 F.3d 856, 861 n.3 (1st Cir. 1993) (in the same vein, several federal appellate courts take that position that “[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative”). *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 648 (1995) (“[Q]uotations directly justifying a result have considerable purchase in legal argument. Direct quotes from previous cases do not always control . . . Still, the deployment of a direct

courts do not like to be reversed,<sup>89</sup> and statements of higher courts, even those made in dicta, are excellent indicators of how a higher court views an issue.<sup>90</sup> Intermediate appellate judges are aware of these dynamics because they too are subject to the same constraints.<sup>91</sup>

While the institutional realities identified by Judge Leval suggest a sometimes intentional use of dicta, not all judges plant dicta into their opinions to influence the law's development, but the potential effect remains.<sup>92</sup> Indeed, there are many alternative explanations for why so many court opinions contain broad swaths of dicta. Karl Llewellyn offers one particularly persuasive explanation. According to Llewellyn, judges employ broad generalizations in their opinions because generalizing inheres in the nature of argument.<sup>93</sup> Llewellyn writes:

[L]ook to any argument. You know where you would go. You reach . . . for a major premise. But never for itself. Its interest lies in leading to the conclusion you are headed for. . . . [W]ith your mind upon your object you use words, you bring in illustrations . . . . When you have done, . . . [y]ou have brought

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quote to support the argued result at least appears to shift the burden of persuasion by imposing a burden of denial on the lawyer seeking to resist the effect of the quote.”).

89. See, e.g., Leval, *supra* note 12, at 1253 n.17 (in describing reasons why he routinely followed the dicta of a higher court, Judge Leval writes, “District judges (at least this one) regarded themselves as bound to follow [the dicta] scrupulously. Had I encountered a situation in which I believed it preferable for good reasons to deviate from [the dicta] (I never did), I doubt I would have had the courage to risk reversal and having to retry the case . . .”).

90. See Llewellyn, *supra* note 32, at 41 (“[E]ven wayside remarks [made in dicta] shed light on the remarker. They may be very useful in the future to him, or to us.”); Bayern, *supra* note 7, at 142 (“[I]t is artificial to ignore what courts have said about the law or even to treat it as abstractly persuasive commentary rather than law. To do so leads to the loss of potentially valuable opportunities for litigants, lower courts, and future courts hierarchically coordinate with the original one to avoid needlessly litigating an issue (or an aspect of an issue) that the original court has in a real sense already decided”); Dorf, *supra* note 1, at 2026. Dorf similarly notes that lawyers often advise clients to pay attention to dicta as a means of predicting what a court will do in a later case. *Id.*

91. Judges are also self-motivated to respect the analysis of fellow judges. As Michael Dorf notes, “once a judge goes down the path of . . . recharacteriz[ing] [holdings as dicta], she can expect similar treatment of her own decisions by her successors. . . .” Dorf, *supra* note 1, at 2066. The principle identified by Dorf would seemingly apply to a judge who relies too heavily on the “mere dicta” label.

92. Note that my thesis does not depend upon establishing any such motivation. What matters most to my thesis is the prevalence of such passages.

93. See also Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 645-51 (1995) (arguing that reasons are typically propositions of greater generality than the conclusions they are reasons for).

generalization after generalization up, and discharged it at your goal; all, in the heat of argument, were over-stated. . . .

So with the judge. . . . [A]s a practiced campaigner in the art of exposition, he has learned that one must prepare the way for argument. . . . You wind up, as a pitcher will wind up – and as in the pitcher’s case, the wind-up often is superfluous. As in the pitcher’s case, it has been known to be intentionally misleading.

With this it should be clear, then, why our canons thunder. Why we create a class of dicta, of unnecessary words, which later readers, their minds now on quite other cases, can mark off as not quite essential to the argument. Why we create a class of obiter dicta, the wilder flailings of the pitcher’s arms . . .

. . .<sup>94</sup>

As Llewellyn argues, dicta are often necessary byproducts of the advocacy art.<sup>95</sup> In light of Llewellyn’s observations, it is difficult to prove that a judge has deliberately used dicta to guide the law’s development, but the tactic can sometimes be inferred. *Florida v. J.L.* is illustrative. The *J.L.* dicta ventured far beyond the facts of *J.L.*’s case, and it was placed at the end of the Court’s opinion where the passage could have easily been deleted without altering the outcome. Thus, the passage seems tailor-made to indicate the Court’s likely ruling in future, related cases, and the passage has proved highly influential in that regard.<sup>96</sup>

Going forward, dicta-planting will continue because particularly persuasive dictum, like the *J.L.* dictum, can render additional decisions unnecessary, an efficient outcome for the issuing court. In a June 2010 opinion, Supreme Court Justice Antonin Scalia openly complained of his colleagues’ apparent use of this tactic.

In *Ontario v. Quon*,<sup>97</sup> a police officer, Jeff Quon, sued his employer, the City of Ontario, alleging that it violated the Fourth Amendment by surreptitiously reviewing text messages sent and

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94. KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 43-44 (1996) (emphasis in original) (alterations added).

95. Judge Aldisert echoes Llewellyn’s observation, noting that “courts tend to overwrite opinions,” and that “it is often said that the ‘discussion outran the decision.’” Aldisert, *et al.*, *supra* note 86, at 2.

96. In the ten years since *J.L.* was decided, lower courts have routinely turned the *J.L.* dictum into law, and have often invoked the *J.L.* dictum as justification for doing so. *See infra* notes 133–134.

97. 130 S. Ct. 2619 (2010).

received on his employer-owned pager.<sup>98</sup> While the Fourth Amendment clearly applies to searches of the private property of government employees,<sup>99</sup> the Supreme Court has not yet established the controlling framework for such claims.<sup>100</sup> In the leading case on the issue, *O'Connor v. Ortega*,<sup>101</sup> a four-Justice plurality applied the standard two-step test for analyzing Fourth Amendment claims<sup>102</sup> — an approach that requires a case-by-case evaluation of the “operational realities” of each particular workplace.<sup>103</sup> Justice Scalia agreed with the plurality’s outcome, but disagreed with its approach, arguing instead for a bright-line rule.<sup>104</sup>

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98. The city investigated Quon’s text messages solely to determine whether Quon was using his employer-paid pager for non work-related purposes. *See id.* at 2625–2626.

99. *See O’Connor v. Ortega*, 480 U.S. 709, 715 (1987) (reaffirming that “[s]earches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment”) (alteration added).

100. *See Quon*, 130 S. Ct. at 2628–29.

101. 480 U.S. 709 (1987).

102. The Fourth Amendment, by its terms, prohibits “unreasonable searches and seizures.” U.S. CONST. amend. IV. Courts reviewing claimed Fourth Amendment violations typically follow a two-step process. In the first step, the court must first decide whether the Fourth Amendment has even been triggered, which requires the court to determine whether a “search” or a “seizure” has actually occurred. Any investigatory action not deemed a “search” or a “seizure” is not within the Fourth Amendment’s explicit terms, and is therefore not subject to Fourth Amendment scrutiny. In “search” cases, a Fourth Amendment search does not occur unless the individual manifested a subjective expectation of privacy that society deems reasonable. *See Katz v. U.S.*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Assuming a Fourth Amendment “search” or “seizure” has actually occurred, the court then moves to step two. In this step, the court considers whether the “search” or “seizure” was unreasonable; if so, the conduct at issue violates the Fourth Amendment. The above two-step approach applies in cases involving criminal investigation, but its applicability to a case such as Quon’s is unclear.

103. According to the plurality, a court analyzing a case such as Quon’s must first decide whether the affected individual could reasonably expect privacy in his *particular workplace*, which would depend upon the “operational realities” of the workplace. *See Ortega*, 480 U.S. at 717–18. If a legitimate privacy expectation is established, the court would then determine whether the employer’s intrusion on that expectation is “reasonable,” also a case-specific inquiry. *See id.* at 719 (“[t]o hold that the Fourth Amendment applies to searches conducted by [public employers] is only to begin the inquiry into the standards governing such searches . . . .”) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). “[Next], we must determine the appropriate standard of reasonableness applicable to the search. A determination of the standard of reasonableness applicable to a particular class of searches requires ‘balanc[ing] the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’”) (quoting *U.S. v. Place*, 462 U.S. 696, 703 (1983)).

104. Rather than conducting a case-specific inquiry into workplace realities, Justice Scalia would have deemed the offices of government employees generally covered by Fourth Amendment protections, but would have ruled that “government searches to retrieve work-related materials or to investigate violations of workplace rules” are *always* reasonable, and

With a limited docket and a ruling on the issue by the courts below, the Court appeared poised to resolve not only the controlling framework, but also the merits of Quon's privacy claim, an issue "of farreaching significance" to the Court.<sup>105</sup> Instead, the Court avoided both issues by declaring the City's search reasonable.<sup>106</sup>

Although the Court treated the privacy issue as superfluous to its decision, the Court engaged in a multi-paragraph musing on the reasonableness of Quon's claim.<sup>107</sup> The Court noted various factors that would influence the analysis. The Court stated, for example, that "many employers . . . tolerate personal use of [cell phones] because it often increases worker efficiency;"<sup>108</sup> that some States have statutes governing such employee-monitoring;<sup>109</sup> and that clearly communicated employer policies will shape employee expectations.<sup>110</sup> Examining Quon's particular workplace, the Court noted that it would be necessary to explore stated department policy and "whether [Quon's supervisor] had . . . authority to make . . . a [policy] change."<sup>111</sup> Extending its hand even further into the dicta cookie jar, the Court declared:

Cell phone and text message communications are so pervasive that some persons may consider them to be essential means . . . for self-expression . . . . That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need [such] devices for personal matters can purchase and pay for their own.<sup>112</sup>

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therefore never violate the Fourth Amendment. *Ortega*, 480 U.S. at 731–32 (Scalia, J., concurring).

105. *Quon*, 130 S. Ct. at 2624.

106. *See id.* at 2628–29 ("It is not necessary to resolve whether [the *O'Connor* plurality test controls]. The case can be decided by determining that the search was reasonable even assuming Quon had a reasonable expectation of privacy.") (alteration added). This approach allowed the Court to avoid the difficult issue of whether the plurality's or Justice Scalia's *O'Connor* framework should control, which, just as importantly, allowed the Court to avoid deciding whether we can reasonably expect privacy in our text messaging communications. *See id.* at 2630–33.

107. *See id.* at 2629–33.

108. *Id.* at 2629 (alteration added).

109. *Id.* at 2630.

110. *Id.*

111. *Id.* at 2629 (alterations added).

112. *Id.* at 2630. After pages of dicta on the dismissed issue, the Court then retreated back to its initial position, insisting that "[i]t is preferable to dispose of this case on narrower grounds," and stating that "we assume . . . Quon had a reasonable expectation of privacy in the

While this entire section is dicta, the majority's analysis methodically outlines the arguments litigants should advance in future, similar cases. The opinion is striking in this regard, and prompted the complaint of Justice Scalia.<sup>113</sup> Justice Scalia's criticisms are well-founded. By dismissing the disputed issues as superfluous, yet extensively commenting upon those very issues, the majority's opinion is reminiscent of an unwarranted advisory opinion.<sup>114</sup> Despite its advisory nature, such dictum often proves highly influential in future cases.

#### IV. DICTA REDEFINED

Law schools generally instruct students to disregard dicta as "non-binding," and leave the impression that dicta, as a whole, can safely be ignored.<sup>115</sup> This view is misleading.<sup>116</sup> In practice, dictum

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text messages [at issue]," and that "[the city's] review of [Quon's text messages] constituted a search within the meaning of the Fourth Amendment." *Id.*

113. Justice Scalia wrote:

Despite the Court's insistence that it is agnostic about the proper test [to employ], lower courts will likely read the Court's self-described "instructive" expatiation on how the *O'Connor* plurality's approach would apply here (if it applied), as a heavy-handed hint about how they should proceed. Litigants will do likewise, using the [Court's opinion] as a basis for bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees' use of electronic media. In short, in saying why it is not saying more, the Court says much more than it should.

*Id.* at 2635 (Scalia, J., concurring).

Justice Scalia also complained of the Court's unwillingness to resolve these critical issues. According to Justice Scalia, "Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice." *Id.*

114. *See* *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("(T)he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, no abstractions' are requisite."). *See also In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999) (noting that appellate courts "decide only actual controversies and avoid advisory opinions").

115. Leading law school texts on legal method, writing, and research routinely make such claims. *See, e.g.,* LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 48 (Aspen 2006) ("You'll need to understand one more concept . . . : the difference between *holding* and *dictum*. The distinction between holding and dictum is important because only a holding is binding on future courts. If the language you are interested in is dictum, a judge in a future case may *choose* to follow it, but is not *bound* to do so.") (emphasis in original). *See also* CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 114 (4th ed. 2002) ("Dictum in an opinion is not meaningless; it may help you accurately predict the authoring court's action in a subsequent case that squarely presents the issue addressed in the dictum. Nonetheless, because dictum does not have the force of precedent, you should take care to read all of the court's reasoning in light of its narrow, fact-specific holding. Do not confuse what a court says, or even what it says it is doing, with what it

is treated differently from court to court and from case to case. Thus, the formalistic categories of holding and dicta require more exacting scrutiny.

The traditional categories of obiter dicta, which involve points not argued nor decided by the court, and judicial dicta, which flow from a more comprehensive discussion of extraneous issues, are distinct from the categories proposed in this article. When a court considers whether a statement is judicial dicta or obiter dicta, the court focuses upon the depth of the issuing court's discussion.<sup>117</sup> However, the thoroughness of a court's discussion is just one of many factors that collectively determine a dictum's persuasiveness.<sup>118</sup> Further, many courts simply do not adhere to the obiter dicta/judicial dicta distinction.<sup>119</sup> Moreover, even in jurisdictions that recognize the distinction, judges sometimes disregard a dictum's label to achieve a desired outcome,<sup>120</sup> all of which greatly reduces the distinction's

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actually does in a case.”).

116. In reality, lower courts apply United States Supreme Court dicta on a fairly routine basis, and often do so without any supporting analysis beyond reference to the dicta itself. *See, e.g., Doan v. Carter*, 548 F.3d 449, 458 (6th Cir. 2009) (rejecting petitioner's Confrontation Clause challenge to the admission of certain out-of-court statements by declaring such statements non-testimonial, citing as its sole support dicta from *Giles v. California*, 128 S.Ct. 2683 (2008)).

117. *See Cates v. Cates*, 619 N.E.2d 715, 717 (“an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if dictum, is a judicial dictum.”).

118. For example, some courts have ruled that “[a]n expression which might otherwise be regarded as dictum becomes an authoritative statement when the court expressly declares it to be a guide for future conduct. Such [statements] must be considered as judicial dicta rather than mere obiter dicta and should be followed in the absence of some cogent reason for departing therefrom.” *State v. Fahringer*, 666 P.2d 514, 515 (Ariz. Ct. App. 1983) (citing *Paley v. Super. Ct. in and for the County of L.A.*, 137 Cal.App.2d 450 (1955); *Thomas v. Meyer*, 168 S.W.2d 681 (Tex. Civ. App. 1943)). Under this rule, a writing judge could presumably make a statement in dicta on an issue not argued by the parties nor deliberately passed upon by the court, but declare that statement to be a guide for future conduct, thereby converting (by fiat) that statement from obiter dicta to judicial dicta.

119. *See Scofield*, *supra* note 33 (illustrating, through case examples, that the failure of some judges to understand the distinction between judicial dicta and obiter dicta has led to confusion in case law).

120. While recognizing the obiter dicta/judicial dicta distinction, the West Virginia Supreme Court, for example, does not always apply it. *See, e.g., West Virginia Dept. of Transp., Div. of Highways v. Parkersburg Inn, Inc.*, 671 S.E.2d 693, 694-95 (W.Va. 2008) (“The Inn contends that the substance of the language in [Jury] Instruction No. 2 was merely obiter dicta in *Woods* and *Richmond*; therefore, it could not be used as an instruction to the jury. Even if we agreed with the Inn that the language in Instruction No. 2 was merely obiter dicta in *Woods* and *Richmond*, we reject the contention that such language could not be used as an instruction to the jury. The mere fact that a ‘correct’ statement of law is set out in an opinion of this Court as obiter dicta does not impugn its integrity as a valid proposition of



practical value.

In contrast to the traditional dicta categories, the categories proposed in this article better depict a dictum's persuasive influence. By examining case examples within each proposed category, it is possible to identify a host of factors that enable a more accurate prediction of a dictum's actual persuasive value.

A. *Vibrant Dicta — When Dicta Becomes the Law*

A pragmatic approach reveals three distinct categories of appellate court dicta: “vibrant dicta,” “dead dicta,” and “divergent dicta.”

Dictum is “vibrant” when it promptly and consistently flowers into law. When this occurs, the distinction between case holdings and dicta is effectively obliterated.<sup>121</sup>

There are countless examples of dicta becoming the law. Broadly, dicta can be converted to law either by the court that issued the dicta or by other courts. An example of the latter category is reflected in the lower courts' treatment of dictum from *Florida v. J.L.*, which holds that an anonymous tip does not justify detaining a suspect for questioning based upon the tip's unsubstantiated allegation that the suspect is armed.<sup>122</sup>

In *J.L.*, an anonymous caller informed police that “a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.”<sup>123</sup> Officers later observed a person fitting the description.<sup>124</sup> Nothing about the suspect's behavior aroused suspicion and no gun was visible.<sup>125</sup> One of the officers then seized and frisked the suspect, *J.L.*, and discovered an illegal weapon.<sup>126</sup>

After being charged with unlawful possession of a firearm, *J.L.*

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law.”). On the flipside, if a judge wishes to *disregard* a dictum, its particular classification simply determines the *extent* to which the judge must defend his opinion.

121. See *Dictum Revisited*, *supra* note 7, at 512 (“[w]hile it may be theoretically true to say that [dicta] are not followed [under the doctrine of stare decisis] as [binding] precedent, it is very difficult in practice to distinguish between following a statement of law in one way and following it in another.”).

122. 529 U.S. 266 (2000). This particular example is discussed at length in Melanie D. Wilson, *Since When is Dicta Enough to Trump Fourth Amendment Rights? The Aftermath of Florida v. J.L.*, 31 OHIO N.U. L. REV. 211 (2005).

123. *J.L.*, 529 U.S. at 268.

124. *Id.*

125. *Id.*

126. *Id.*

successfully moved to suppress the gun,<sup>127</sup> and the Florida Supreme Court affirmed.<sup>128</sup> The United States Supreme Court later ruled, in a 9–0 decision, that the lack of police corroboration made the anonymous tip insufficiently reliable.<sup>129</sup> Before closing its opinion, the Court noted that anonymous, uncorroborated tips might prove sufficiently reliable where the tip alleges a more significant public danger.<sup>130</sup> In dicta,<sup>131</sup> the Court declared:

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm. . . . In [this case], we [simply] hold that an anonymous tip lacking [sufficient] indicia of reliability . . . does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.<sup>132</sup>

In a non-emergency situation, J.L. deemed an anonymous tip insufficient to justify a Terry stop. The J.L. dictum implies a different outcome in cases of heightened public danger. Consistent with J.L.’s dictum, every federal appellate court to have considered the question has distinguished J.L. when an anonymous tip alleges not just general criminality, but an ongoing emergency.<sup>133</sup> A number of those courts

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127. *Id.* at 269.

128. *Id.* Two Florida Supreme Court justices dissented. Significantly, these dissenters argued that the safety of the police and the public justifies a “firearm exception” to the rule barring investigatory stops and frisks on the basis of bare-boned anonymous tips. *Id.*

129. *Id.* at 274. Because the *J.L.* officers had not corroborated the substance of the tip, as in *Alabama v. White*, the *J.L.* Court deemed the officers’ conduct unjustified. *See id.* at 270-71.

130. *Id.* at 273.

131. When a court discusses how its rule of decision would apply to facts other than those presented in the dispute before it, the passage is dicta. *See* CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 113 (3rd ed. 1998). This is the type of dicta contained in *J.L.*

132. *J.L.*, 529 U.S. at 273-74.

133. *United States v. Hicks*, 531 F.3d 555, 558-59 (7th Cir. 2008). Courts distinguishing *J.L.* in this manner include *United States v. Elston*, 479 F.3d 314 (4th Cir.2007) (upholding *Terry*-level stop and weapons frisk based upon the report of a self-identified 911 caller, who did not want her name given to police, stating a drunk driver carrying loaded gun and threatening to shoot someone had just left her home); *United States v. Hicks*, 531 F.3d 555, 558-61 (7th Cir. 2008) (upholding *Terry*-level stop and weapons frisk based upon a 911 caller, giving two different names, reporting an armed man “beating up a woman,” and declaring, “*J.L.* does not govern because [the caller] gave the 911 operator enough information to identify him and his location, and because he reported an ongoing emergency”); *United States v. Drake*, 456 F.3d 771 (7th Cir. 2006) (upholding *Terry* stop of a vehicle based upon the report

justified their rulings by explicitly invoking the above dictum.<sup>134</sup>

Notably, the basis for these rulings is not the Fourth Amendment's exigent circumstances exception,<sup>135</sup> which typically requires probable cause.<sup>136</sup> Rather, these cases have held that an anonymous tip, even without corroboration, creates the reasonable suspicion necessary to conduct a Terry search when the tipster alleges an ongoing emergency.<sup>137</sup> According to some courts, there is a "presumption of reliability given to emergency reports made in 911 calls;"<sup>138</sup> further, in a truly emergent situation, the type of

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of a 911 caller stating that four black men in a Cadillac were involved in a disturbance, that the men had a gun, and that one of them "pulled a gun on my son-in-law," finding reasonable suspicion based upon the call alone, the court declared, "We . . . presume the reliability of an eyewitness 911 call reporting an emergency situation for purposes of establishing reasonable suspicion . . . . It is enough in this case that [the] 911 call reported an immediate threat to public safety . . . ."; *United States v. Terry-Crespo*, 356 F.3d 1170, 1176 (9th Cir. 2004) (upholding *Terry*-level stop and weapons frisk based upon a 911 caller's report that the suspect had just threatened him with a firearm, reasoning, in part, that "an emergency 911 call is entitled to greater reliability than an anonymous tip concerning general criminality" and distinguishing *J.L.* on these grounds). *See also* *United States v. Brown*, 496 F.3d 1070, 1074-79 (10th Cir. 2007) (upholding *Terry*-level stop and weapons frisk based upon 911 caller reporting that a woman was being held hostage by an armed man, but distinguishing *J.L.* based upon the more detailed and firsthand information provided by the informant, along with the caller's lack of true anonymity and limited police corroboration). Some state courts disagree. *See, e.g.,* *Garcia v. Comm.*, 2010 WL 2539756 (Ky. App. 2010) (rejecting, over a vigorous dissent, application of *J.L.* dicta in case involving a call from an unidentified man who reported seeing a "car full of Mexicans" swerving on the road and almost hitting another car).

134. *See, e.g., Hicks*, 531 F.3d at 558 (rejecting the defendant's argument "because the tip here reported an ongoing emergency"); *Elston*, 479 F.3d at 319 (distinguishing *J.L.* on the grounds that the 911 caller reported an individual expressly threatening to shoot someone, and declaring, "in *J.L.*, the Supreme Court went out of its way to distinguish the hypothetical situation in which an anonymous caller reports an urgent danger to the community").

135. *But see, e.g., Anthony v. City of New York*, 339 F.3d 129, 132 (2d Cir.2003) (applying the exigent circumstances exception rather than the *Terry* doctrine to uphold the warrantless entry of the home of a 911 caller reporting that her husband beat her and possessed weapons); *United States v. Holloway*, 290 F.3d 1331, 1137-39 (11th Cir.2002) (applying the exigent circumstances exception rather than the *Terry* doctrine to uphold the warrantless entry of a home based upon a 911 caller reporting gunshots and arguing emanating from the residence, but stating that "in an emergency, the probable cause element may be satisfied where officers reasonably believe a person is in danger," and distinguishing *J.L.* based upon the fact that the investigatory stop in *J.L.* was not based on an emergency situation).

136. *See Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (recognizing exigencies to include (1) hot pursuit of a fleeing felon; (2) imminent destruction of evidence; (3) the need to prevent a suspect's escape; and (4) risk of harm to the police or others; and noting that, other than hot pursuit, the police must have probable cause to believe that one or more of the factors justifying an entry based upon exigent circumstances is present).

137. *See supra* note 133.

138. *Hicks*, 531 F.3d at 558 (citing *United States v. Drake*, 456 F.3d 771, 774-75 (7th Cir. 2006)). According to *Hicks*, "A rule requiring a lower level of corroboration before

corroboration contemplated by J.L. would almost never be possible.<sup>139</sup> Along with the assurances of a unanimous J.L. Court, these underlying considerations have prompted a nearly universal approval of the J.L. dictum by the lower federal courts.

*B. Dead Dicta — When Dicta is Relegated to “Mere Dicta”*

“Dead dicta” is dicta that is generally deemed non-binding. A dictum can die explicitly through a court’s pronouncements, or implicitly through rulings rejecting the dictum.

When a court wishes to declare a dictum non-binding, the court often designates the passage “mere dicta,”<sup>140</sup> thereby preventing the dictum from flowering into law. Attachment of the “mere dicta” label is sometimes performed by the very court that issued the dictum. An example of this dicta type is seen in *United States v. Salerno*.<sup>141</sup>

In *Salerno*, the Supreme Court considered the constitutionality of a rule permitting a criminal defendant’s pretrial detention on the basis of his future dangerousness, rather than on the more traditional considerations of flight.<sup>142</sup> In addressing a related issue, *Stack v. Boyle* had earlier declared that “[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant’s presence at trial] is ‘excessive’ under the Eighth Amendment.”<sup>143</sup> The *Salerno* Court wrestled with the *Stack* dictum in the following passage:

Respondents . . . rely on [the above dictum from] *Stack v. Boyle*. . . . In respondents’ view, since the Bail Reform Act allows a court essentially to set bail at an infinite amount for reasons not related to the risk of flight, it violates the Excessive Bail Clause. . . .

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conducting a stop on the basis of an emergency report is not simply an emergency exception to the rule of *J.L.* It is better understood as rooted in the special reliability inherent in reports of ongoing emergencies.” *Id.* at 558-59.

139. As the Ninth Circuit has explained, “[p]olice delay while attempting to verify an identity or seek corroboration of a reported emergency may prove costly to public safety and undermine the 911 system’s usefulness.” *Terry-Crespo*, 356 F.3d at 1176.

140. See, e.g., *infra* note 157. See also *Dictum Revisited*, *supra* note 7, at 509 (“The principle of stare decisis is constricting. A statement of the law that conflicts with the view of a judge or an attorney may be decisive unless it can be avoided. Labeling the statement a dictum is one simple means of evasion.”).

141. 481 U.S. 739 (1987).

142. See *id.* at 741-45 (describing the issue addressed in *Salerno*).

143. *Boyle*, 342 U.S. 1, 5 (1951).

[W]e reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release. The above-quoted dictum in *Stack v. Boyle* is far too slender a reed on which to rest this argument. The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed.<sup>144</sup>

Although *Stack*'s dictum appears to support the respondents' argument, the Salerno Court entirely rejected *Stack*'s dictum because the precise issue raised in Salerno was not squarely considered by the *Stack* Court.<sup>145</sup>

Less directly, dicta can die as the result of a series of rulings rejecting an argument premised upon the particular dictum. This type of dead dicta is found in double jeopardy law.

The Fifth Amendment Double Jeopardy Clause protects against successive prosecutions for offenses deemed "the same."<sup>146</sup> Despite the general prohibition against prosecution for offenses that contain sufficiently similar elements, an exception exists for otherwise identical offenses proscribed by separate sovereigns; under this "dual sovereignty" exception, there is no restriction to both state and federal prosecution for offenses criminalizing identical conduct.<sup>147</sup>

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144. *Salerno*, 481 U.S. at 752-53 (emphasis added).

145. See *Central Virginia Comm. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"); *Cohens v. Virginia*, 19 U.S. 264, 399 (1821) ("It is a maxim . . . that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

146. U.S. CONST. amend. V. Under prevailing standards, offenses are distinct when each offense requires proof of a fact or element the other does not. Thus, offense X, which requires proof of elements A, B, and C, would be considered "the same" as offense Y, which requires proof of elements A and B. In this example, Offense Y, a lesser-included offense of offense X, does not require proof of an element not also required to prove offense X. Under this scenario, a prosecutor could not prosecute a defendant for both common law larceny and common law robbery because larceny is a lesser-included offense of robbery. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.").

147. See *Koon v. United States*, 518 U.S. 81, 112 (1996) ("Successive state and federal prosecutions do not violate the Double Jeopardy Clause"); *United States v. Tirrell*, 120 F.3d

While the dual sovereignty doctrine is well-established, the United States Supreme Court, in *Bartkus v. Illinois*,<sup>148</sup> noted a possible exception to the rule. In *Bartkus*, the defendant was tried in federal court for violating a federal robbery statute, but was acquitted.<sup>149</sup> A few weeks later, the defendant was charged with state-law robbery for the same act.<sup>150</sup> The defendant was then convicted in Illinois state court.<sup>151</sup> On appeal, the defendant challenged his state prosecution on double jeopardy grounds.<sup>152</sup> The United States Supreme Court rejected the claim under the dual sovereignty exception.<sup>153</sup> While this ruling effectively resolved the defendant's claim, the Court issued the following dictum:

[The record] does not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of a federal prosecution after an acquittal. It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.<sup>154</sup>

The *Bartkus* dictum created the so-called “sham exception” to dual sovereignty.<sup>155</sup> Despite the *Bartkus* Court's warning that one

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670, 676 (7th Cir. 1997) (“successive federal and state prosecutions for the same offense are permitted; the Double Jeopardy Clause is inapplicable when two different sovereigns prosecute the same defendant.”). When the “dual sovereignty” doctrine applies, the federal government may prosecute a defendant for a federal crime after a state previously prosecuted the defendant for what is functionally the same state-law offense — or vice versa. This is true regardless of whether the initial prosecution results in conviction or acquittal. The United States Supreme Court has repeatedly reaffirmed this principle since as early as *Fox v. State of Ohio*, 5 How. 410 (1847).

148. *Bartkus*, 359 U.S. 121 (1959).

149. *Id.* at 121–22.

150. *Id.* at 121. Indeed, the agent of the Federal Bureau of Investigation who had conducted the investigation on behalf of the Federal Government turned over to the Illinois prosecuting officials all the evidence he had gathered against the defendant. Some of that evidence had been gathered after the federal court acquittal. *Id.* at 122.

151. *Id.* at 121.

152. *Id.* at 122.

153. *Id.* at 136. According to the Court, “rejecting the dual sovereignty principle would require the Court to “disregard of a long, unbroken, unquestioned course of impressive adjudication . . .” *Id.*

154. *Id.* at 123–24.

155. At least five federal courts of appeal have recognized the existence of the sham prosecution exception (despite not having applied the exception very often). *See* United States

sovereign must not act as the “mere puppet” of another,<sup>156</sup> the sham exception has been entirely rejected by many courts as the product of “mere dicta,”<sup>157</sup> and has been narrowly interpreted by most others.<sup>158</sup>

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v. 38 Whalers Cove Dr., 954 F.2d 29, 38 (2d Cir. 1992) (“the Double Jeopardy Clause prohibits two criminal punishments for the same offense only when they are sought by the same sovereign government. The Double Jeopardy Clause is inapplicable when separate governments prosecute the same defendant, for the defendant has offended both sovereigns”); *In re Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990) (“Although a ‘tool of the same authorities’ exception is possible in some circumstances, . . . that exception may only be established by proof that State officials had little or no independent volition in their proceedings. In this case, however, the complaint alleged that the state officials instituted and controlled the state proceeding, which precludes the establishment of that exception.”)(citations omitted); *United States v. Louisville Edible Oil Prods., Inc.*, 926 F.2d 584, 587-88 (6th Cir. 1991) (recognizing the sham exception, but rejecting defendant’s claim on the merits); *United States v. Moore*, 822 F.2d 35, 37-38 (8th Cir. 1987) (recognizing “the narrow exception to the dual sovereignty doctrine carved out in *Bartkus*,” but rejecting application of the sham exception on a record “demonstrate[ing] nothing more than mere cooperation between the federal government and Missouri authorities, which cooperation the Court in *Bartkus* explicitly approved”)(citation omitted); *United States v. Raymer*, 941 F.2d 1031, 1037 (10th Cir. 1991) (despite rejecting defendant’s double jeopardy claim, the court recognized the existence of the sham exception, stating, “[a] possible exception to the dual sovereignty rule might exist where a federal or state prosecution was merely a tool manipulated by the other sovereign to revive a prosecution barred on federal constitutional grounds”).

156. This phrase was used by the Seventh Circuit Court of Appeals to describe the nature of the sham exception. *United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997).

157. *United States v. Moore*, 370 F. App’x. 559, 560 (5th Cir. 2010) (per curiam), *cert. denied*, 131 S.Ct. 226 (2010) (“[I]t is unclear whether [the sham] exception to the dual-sovereignty doctrine exists in this circuit. This exception originated from *Bartkus v. Illinois*, where the Supreme Court suggested in dicta that there may be an exception to the dual-sovereignty doctrine when one sovereign is ‘merely a tool’ of the other in bringing a second prosecution that is a ‘sham and a cover’ for a prosecution that would otherwise be barred under the Double Jeopardy Clause. We have not formally recognized or applied the exception; when confronted with the issue, we have held that, even if the exception exists, the facts do not merit its application.”); *United States v. Patterson*, 809 F.2d 244, 247, n.2 (5th Cir. 1987) (“The defendants contend that the Supreme Court has held that the dual sovereignty doctrine is subject to the qualification that the state prosecution may not be used merely as a cover and tool for a federal prosecution. . . . It is unclear whether such a holding has been established by the Supreme Court. [Rather], the Court in *Bartkus* held that the record failed to establish the petitioner’s claim that the state’s prosecution had been a tool of the federal authorities. The Court, therefore, did not squarely address the issue of whether, if substantiated by the record, a ‘sham’ situation would constitute an exception to the dual sovereignty doctrine.”); *United States v. Tirrell*, 120 F.3d 670, 676 (7th Cir. 1997) (“In *Bartkus* the Supreme Court, in dicta, suggested that it would be impermissible for one sovereign to use the other as a ‘tool’ to bring a successive prosecution, thereby making the second prosecution a ‘sham and a cover’ for the first prosecution. This circuit has expressed doubts about ‘whether *Bartkus* truly meant to create such an exception, and we have uniformly rejected such claims.”) (citations omitted).

158. *United States v. Dowdell*, 595 F.3d 50, 63 (1st Cir. 2010) (“the *Bartkus* exception is ‘narrow[ly] . . . limited to situations in which one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings.’”) (quoting *United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996));

The typical approach to the *Bartkus* dictum is exemplified by *United States v. Bernhardt*.<sup>159</sup> In that case, a federal trial court applied the sham exception, but the Ninth Circuit Court of Appeals reversed.<sup>160</sup> Initially, the State of Hawaii charged Curtis and Carl Bernhardt with conspiracy and misapplication of bank funds; however, those charges were dismissed on statute of limitations grounds. Just prior to the dismissal, Stephen Mayo, the Hawaii prosecutor, contacted the local United States Attorney to express concern about the case. Up until that point, no federal agency had investigated the matter. The United States Attorney agreed to undertake a federal prosecution with the express understanding that Mayo would become its lead attorney and that the state would pay Mayo's salary. With this arrangement in place, Mayo became lead counsel in the federal prosecution. The federal grand jury then indicted the Bernhardt's, but the district court dismissed the indictment on double jeopardy grounds.<sup>161</sup>

On appeal, the Bernhardt's argued that the federal prosecution was a sham, in that the federal prosecution was the functional equivalent of a second state prosecution. They relied upon Mayo's lead role in both proceedings, the state's funding of both proceedings, the federal government's lack of interest in the case prior to discussions with Mayo, and the absence of a federal interest in the prosecution.<sup>162</sup>

In overturning the district court's ruling, the Ninth Circuit reasoned that while "these circumstances are troubling," they are not

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*United States v. Figueroa-Soto*, 938 F.2d 1015, 1020 (9th Cir. 1991) ("As *Bartkus* makes plain, there may be very close coordination in the prosecutions, in the employment of agents of one sovereign to help the other sovereign in its prosecution, and in the timing of the court proceedings so that the maximum assistance is mutually rendered by the sovereigns. None of this close collaboration amounts to one government being the other's 'tool' or providing a 'sham' or 'cover.'"). In a recent Michigan case, the court could only find three Sixth Circuit cases that even mentioned the sham exception—all of which were unpublished, and all of which denied relief. *United States v. Harris*, 02-80823, 2005 WL 1606495 (E.D. Mich. 2005). For an example of where the *Bartkus* "sham exception" has been successively invoked, see *United States v. Belcher*, 762 F.Supp. 666 (W.D.Va. 1991).

159. 831 F.2d 181 (9th Cir. 1987). See also *United States v. Padilla*, 589 F.2d 481 (10th Cir. 1978) (following an approach similar to *Bernhardt*).

160. The district court ruled that the sham exception barred the federal prosecution, reasoning that the federal indictment was designed to carry out a failed state prosecution. See 831 F.2d at 182-83.

161. *Id.* at 182.

162. *Id.* On those facts the district court concluded "that the motivation, that the inducement, that the purpose of federal indictment was to carry out the state prosecution which, for one reason or another, had been lost." *Id.* at 183.



“sufficient as a matter of law to invoke the ‘narrow [sham] exception.’”<sup>163</sup> Remanding the case for further factual development, the court concluded that “sufficient independent federal involvement would save the prosecutions from th[e] [sham] exception,” and specifically noted the “several Assistant United States Attorneys [who] may have worked on the Bernhardt prosecutions.”<sup>164</sup> Upon further appeal, the Ninth Circuit found “no obstacle to completion of this case.”<sup>165</sup>

As Bernhardt exemplifies, despite the sham exception’s grounding in United States Supreme Court case law, the exception has been largely rejected as “mere dicta,”<sup>166</sup> whereas the J.L. dictum, which shares similar roots, has not.<sup>167</sup> Along with the categories of vibrant dicta and dead dicta, one additional category of pragmatic dicta remains.

### C. *Divergent Dicta — When Dicta Spurns Disagreement*

The final dicta category is best described as “divergent.” Neither dead nor vibrant, this type of dicta does not promptly flower into law, nor is it dismissed outright as “mere dicta.” Rather, divergent dictum prompts scholarly commentary and lower court development of the dictum, and is generally marked by disagreement as to the dictum’s effect. The category of divergent dicta is often characterized by more ambiguous wording than what appears in vibrant dicta such as that in J.L., and typically includes internal disagreement among the judges of the issuing court. An example of this dicta type is contained in *Giles v. California*,<sup>168</sup> a Supreme Court opinion determining the circumstances under which a criminal defendant will forfeit his Sixth Amendment confrontation right through his wrongdoing.<sup>169</sup>

Before *Giles*, the Court in *Crawford v. Washington* deemed the Sixth Amendment violated when a testimonial statement is admitted without opportunity to cross-examine the out-of-court declarant,<sup>170</sup>

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163. *Id.*

164. *Id.*

165. *United States v. Bernhardt*, 840 F.2d 1441, 1452 (9th Cir. 1988).

166. *See supra* notes 157–158.

167. *See supra* notes 133–134 and accompanying text.

168. 128 S.Ct. 2678 (2008).

169. *See id.* at 2682 (framing the issue as “whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right.”).

170. *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (stating “[t]estimonial statements

but recognized forfeiture by wrongdoing as an exception to this rule (“forfeiture” or “forfeiture exception”).<sup>171</sup> When forfeiture applies, the defendant loses his confrontation right on the theory that the defendant, through his wrongdoing, “has been the instrument of the denial of his own right of cross-examination[;]”<sup>172</sup> as a result, a testimonial statement becomes admissible despite no opportunity for cross-examination.<sup>173</sup>

While the Crawford ruling was sound,<sup>174</sup> Crawford’s rigid insistence upon cross-examination made it more difficult for prosecutors to secure convictions,<sup>175</sup> particularly in domestic abuse cases,<sup>176</sup> where victims are often reluctant to testify.<sup>177</sup> Arguably

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of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”)

171. See *Crawford*, 541 U.S. at 56, n.6, 62 (recognizing forfeiture by wrongdoing and dying declarations as exceptions to the *Crawford* rule). See also *Giles*, 128 S. Ct. at 2682 (acknowledging that “two forms of testimonial statements were admitted at common law even though they were unfronted[.]” and stating that “[t]he first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying.”).

172. *State v. Langley*, 354 N.W.2d 389, 400 (Minn. 1984).

173. See, e.g., *United States v. Carlson*, 547 F.2d 1346, 1360 (8th Cir. 1976) (holding the defendant waived his right to confrontation when he intimidated a witness into not testifying at trial).

174. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (The pre-*Crawford* rule of *Ohio v. Roberts* allowed admission of unfronted, out-of-court statements when those statements fell within a “firmly-rooted hearsay exception,” or were otherwise “reliable.”). See *Crawford*, 541 U.S. at 61-62 (*Crawford* replaced the *Roberts* reliability test with a much more rigid cross-examination requirement. In overruling *Roberts*, *Crawford* complained that the *Roberts* standard had proved vague and amorphous, and even authorized “trial by affidavit”—the very concern the Confrontation Clause was meant to eradicate.). See also *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (“The primary object of [the Confrontation Clause] was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness.”).

175. See *Davis v. Washington*, 547 U.S. 813, 833 (2006), decided together with *Hammon v. Indiana*, 547 U.S. 813 (2006) (“The *Roberts* [rule] undoubtedly made recourse to th[e] [forfeiture] doctrine less necessary, because prosecutors could show the ‘reliability’ of ex parte statements more easily than they could show the defendant’s procurement of the witness’s absence.”). See also Brief of Richard D. Friedman as Amicus Curiae in Support of Respondent, *Giles v. California*, 128 S. Ct. 2678 (2008) (No. 07-6053), 2008 WL 859395, at \*12 n.9 (“Given *Crawford*, the confrontation right . . . is rigid and categorical in nature. If the rule of forfeiture of the confrontation right is not fully developed, therefore, inequitable results will frequently occur.”).

176. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 750 (2005) (reporting that 63 percent of survey respondents from over 60 prosecutors’ offices concluded that *Crawford* significantly impeded prosecutions of domestic violence, and 65 percent reported that victims of domestic violence are less safe in their jurisdictions as a result of *Crawford*).

177. See *id.* at 751, 768–72 (explaining why domestic abuse victims are often reluctant to testify against their abuser, and noting how frequently abuse victims recant).

anticipating those concerns, the Crawford Court declared the need for an expansive forfeiture exception, yet failed to delineate its precise scope.<sup>178</sup>

Between 2004 and 2008, lower courts sought to resolve whether forfeiture should be triggered by any wrongdoing that effectively prevents a witness from testifying, or instead whether the wrongdoer must further intend to prevent such testimony.<sup>179</sup> After four years and a lower court split,<sup>180</sup> the Court resolved the issue in favor of the latter interpretation.<sup>181</sup> According to the Court's opinion in *Giles v.*

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178. *Crawford*, 547 U.S. at 61–62 (The *Crawford* Court ratified a seemingly broad forfeiture exception, declaring that “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds”). *See also Davis*, 547 U.S. at 833 (“[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. . . . We reiterate . . . that ‘the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.’ That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”) (emphasis in original).

179. In certain instances of wrongdoing, the forfeiture exception clearly trumps the defendant's confrontation right. For example, when a criminal defendant has successfully bribed or intimidated a witness, the defendant's actions strongly suggest an intent to prevent the witness from testifying. *See Giles*, 128 S. Ct. at 2691 (“The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them . . .”). But unlike the bribery context, where the briber's very actions reveal his intent, not all “wrongful acts” that lead to the witness's absence from trial should necessarily trigger the forfeiture exception. For example, a defendant who negligently collides into a witness's automobile the evening before trial, causing her to miss her scheduled testimony, would not forfeit his confrontation right. *See People v. Giles*, 19 Cal.Rptr. 3d 843, 850–51 (Cal. Ct. App. 2004) (providing a similar example). This is true even though the defendant's negligence is considered “wrongful.” Between these extremes, however, is a plethora of wrongdoing that may or may not trigger the forfeiture exception.

180. *See State v. Romero*, 133 P.3d 842, 850 (N.M. Ct. App. 2006) (“Despite widespread acceptance of the doctrine of forfeiture by wrongdoing, however, there has been some confusion over its requirements. Specifically, . . . courts have disagreed over the [applicability of an] intent requirement . . .”). The following courts, among others, explicitly rejected the rule that a defendant must have intended to prevent the witness from testifying for forfeiture to apply: *United States v. Garcia-Meza*, 403 F.3d 364, 370–71 (6th Cir. 2005) (applying forfeiture in murder case with facts similar to *Giles*); *State v. Jensen*, 727 N.W.2d 518, 533 (Wis. 2007) (same); *People v. Moore*, 117 P.3d 1, 5 (Colo. App. 2004) (same); *State v. Meeks*, 88 P.3d 789, 794–795 (Kan. 2004) (applying forfeiture to admit statements of dying victim in murder case); *United States v. Mayhew*, 380 F.Supp.2d 961, 969 (S.D. Ohio 2005) (applying forfeiture in facts similar to *Meeks*). On the other hand, the following courts endorsed the intent requirement later adopted by *Giles*: *People v. Moreno*, 160 P.3d 242, 247 (Colo. 2007) (ruling defendant's wrongful conduct must have been “designed, at least in part, to subvert the criminal justice system by depriving that system of the evidence upon which it depends.”); *State v. Romero*, 133 P.3d 842, 855–56 (N.M. Ct. App. 2006) (requiring intent-to-silence to invoke the forfeiture doctrine, and rejecting argument that the requisite intent can be inferred); *Comm. v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005).

181. *See Giles v. California*, 128 S. Ct. 2678, 2681–88 (determining the scope of the

California, the forfeiture exception is triggered by proving both an actus reus, consisting of an act of wrongdoing that prevents a witness from testifying, coupled with a mens rea, requiring proof of a specific intent to prevent such testimony.<sup>182</sup>

After articulating and defending its specific intent requirement, and after fully resolving the case and summarizing its reasoning,<sup>183</sup> the Giles majority turned its focus to the dissent.<sup>184</sup> In the final section of its opinion, the Giles majority responded to the dissent's proposal of a more lenient standard in domestic abuse cases.<sup>185</sup> The Court, in dicta,<sup>186</sup> declared:

The dissent closes by pointing out that a forfeiture rule which

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forfeiture exception through analysis of the historical record).

182. See *id.* at 2684. See also *Crawford v. Commonwealth*, 686 S.E.2d 557, 564 (Va. Ct. App. 2009) (en banc) (“the Supreme Court made clear in *Giles* that the [forfeiture by wrongdoing] doctrine only applied ‘when the defendant engaged in conduct *designed* to prevent the witness from testifying.’ Thus, under the doctrine of forfeiture by wrongdoing, ‘unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying.’”) (citing *Giles*, 128 S. Ct. at 2683-84); *In re Rolandis G.*, 902 N.E.2d 600, 615 (Ill. 2008) (“The [*Giles*] Court held that at common law an unconfronted testimonial statement could not be admitted without a showing that the defendant intended to prevent the witness from testifying. In other words, according to the Court, for forfeiture by wrongdoing to apply, the evidence had to show that the defendant engaged in witness tampering or some type of conduct designed to prevent the witness from testifying, thwart the judicial process, or procure the witness’ absence from trial.”) (citing *Giles*, 128 S.Ct. at 2683–84).

183. See *Giles*, 128 S. Ct. at 2688 (summarizing the four primary arguments supporting the Court’s interpretation of the common-law forfeiture rule).

184. See *id.* at 2688–93.

185. See *id.* at 2693.

186. While some courts have characterized the disputed *Giles* statements as part of its holding, they are more properly classified as dicta. See *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986) (While one could debate whether this passage is actually dicta, reading this passage as dicta is appropriate because it “could have been deleted without seriously impairing the analytical foundations of the holding . . .”). See also *State v. Koput*, 418 N.W.2d 804, 810–11 (Wis. 1988) (overturning the lower appellate court’s decision, in part, because “[t]he portion of the opinion . . . on which the court of appeals relied was not essential to the . . . rationale [of the case]. It could have been omitted without doing violence to the logic of the opinion,” and is therefore “irrelevant to the *ratio decidendi*”); *Leval*, *supra* note 12, at 1256 (“If the court’s judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner. It is superfluous to the decision and is dictum.”); RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 19 (1961) (“the only ‘binding’ aspect of a case is . . . ‘that part of it, called the *ratio decidendi*, which is considered to have been necessary to the decision of the actual issue between the litigants.’”) (citing CARLTON K. ALLEN, *LAW IN THE MAKING* 241–42 (1967)).

ignores Crawford would be particularly helpful to women in abusive relationships. . . . [W]e are puzzled by the dissent's [position]. . . . Domestic violence is an intolerable offense. . . . But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.

The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution - rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.<sup>187</sup>

After setting forth these principles, the Court noted that the lower courts were "free to consider evidence of the defendant's intent on remand[.]"<sup>188</sup> a statement appearing to direct those courts to apply the above principles.

The more one examines the Giles dictum quoted above, the more perplexing it becomes. First, the above dictum was written in response to the dissent's proposed standard that would have eased the burden of proving forfeiture in cases of domestic abuse, and the passage is targeted to those particular cases. Giles itself involved incidents of domestic abuse, and the Giles Court follows the above passage with directions to "consider evidence of [Giles's] intent on remand," so the above passage can reasonably be read as identifying the types of evidence relevant to that inquiry.<sup>189</sup>

Second, while purporting to reject the dissent's more lenient standard, the majority actually goes a long way toward adopting it.

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187. *Giles*, 128 S. Ct. at 2692–93 (emphasis added).

188. *Id.* at 2693 (emphasis added).

189. *See State v. Hubbard*, 2009 WL 2568200, at \*8 (Tenn. Crim. App. 2009) (describing the pertinent *Giles* passage as "guidance with respect to the types of evidence that may be available to establish a defendant's intent to prevent testimony in cases involving domestic violence").

The Giles dictum could, for example, permit a court to infer the requisite Giles intent based solely upon the fact of the relationship.<sup>190</sup> In his concurrence, Justice Souter read the Giles dictum to mean that “[the requisite] element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship.”<sup>191</sup> Expounding upon Justice Souter’s reading, Justice Breyer’s dissent argued that such an inference of intent “is in effect not to insist upon a showing of ‘purpose.’”<sup>192</sup> In Justice Breyer’s view, it makes little sense to require proof of a purposeful silencing of the would-be witness if the requirement can be proven by the mere nature of the typical abusive relationship.<sup>193</sup> This, however, is a reasonable interpretation of the Giles dictum.

Third, the above-quoted passage is internally inconsistent. Justice Breyer’s dissent notes that this passage “creat[es] a kind of presumption that will transform purpose into knowledge-based intent—at least where domestic violence is at issue.”<sup>194</sup> While the second paragraph of the above-quoted passage supports Justice Breyer’s reading, the first paragraph purports to reject the dissent’s view. This internal inconsistency adds further ambiguity to the passage, which, in turn, makes the Giles dictum malleable in the hands of future courts.

Fourth, in the final sentence of the above passage, the majority appears to concede that the requisite showing of intent might be inferred from distant interactions between the defendant and witness, even if the act of wrongdoing itself (e.g., the killing of the witness) involved no such intent, and even if those distant actions occurred long before the requisite act of wrongdoing.<sup>195</sup> As the final sentence’s

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190. *But see In re Rolandis G.*, 902 N.E.2d 600, 614 (Ill. 2008) (refusing to *presume* the requisite Giles intent based upon the fact of abuse alone).

191. *Giles*, 128 S.Ct. at 2682 (Souter, J., concurring in part).

192. *Id.* at 2708 (Breyer, J., dissenting).

193. *See id.* (noting that under Justice Souter’s reading of the Giles dictum, a “showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim,” and that “[d]oing so when, in fact, the abuser may have had other matters in mind apart from preventing the witness from testifying, is in effect not to insist upon a showing of ‘purpose’”).

194. *Id.*

195. *See* Marc McAllister, *Down But Not Out: Why Giles Leaves Forfeiture by Wrongdoing Still Standing*, 59 CASE W. RES. L. REV. 393 (2009). *See also* State v. Her, 781 N.W.2d 869, 874 (Minn. 2010) (remanding for determination of defendant’s intent under *Giles*, and explaining that in a case decided before *Giles*, “we did not require any showing that the defendant intended to prevent his wife from testifying against him,” but that “there was evidence in [that case] that, approximately four years before the murder, the defendant had

wording and structure reveal, this evidence is separate and apart from “evidence of ongoing criminal proceedings at which the victim would have been expected to testify.”<sup>196</sup> By loosening the link between the Giles actus reus and mens rea requirements, this particular statement brings further ambiguity to the Giles holding.

Finally, in cases of domestic abuse, the majority appears to expand its specific intent requirement to encompass not just intent to prevent a witness from testifying, a very specific act of cooperation, but also intent to prevent “cooperat[ion] with a criminal prosecution” more generally, which naturally encompasses acts of assistance beyond formal testimony. The majority declares that “where an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from [1] reporting abuse to the authorities or [2] cooperating with a criminal prosecution,” and that either finding would “render her prior statements admissible under the forfeiture doctrine.” Intent to prevent a witness from “reporting abuse” or from “cooperating with a criminal prosecution” is much broader in scope, and provides more avenues of proof for the prosecution than intent to prevent trial testimony. As such, this particular passage appears to broaden the Giles requirement, expanding the requisite intent of preventing trial testimony to the broader intent of preventing all forms of cooperation.

Given the perplexing nature of the Giles dictum, lower courts interpreting the passage have reached incredibly diverse conclusions as to its meaning and effect. This divergent treatment is exemplified by the competing arguments in *Crawford v. Commonwealth*.<sup>197</sup> In *Crawford*, defendant Anthony Crawford was charged with murdering

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threatened to murder the victim if she reported his abuse to the police.” According to the *Her* court, “[e]vidence of this type of threat would be relevant evidence under the standard announced in *Giles*.”). *See also id.* at 877 (discussing the *Giles* dicta, and advising the lower court that “[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help” could be helpful to the question of forfeiture, ‘as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.’”) (quoting *Giles*, 128 S.Ct. at 2693).

196. This reading is consistent with the court’s analysis in *State v. McLaughlin*, 265 S.W.3d 257, 272–3 (Mo. 2008) (noting that *Giles* “clarified” “[t]he parameters of the forfeiture by wrongdoing doctrine,” and upholding trial court’s determination that defendant forfeited his right to confront the murder victim based upon (1) the defendant’s prior acts of domestic violence committed “during the time that [the victim] was attempting to break from the relationship [with defendant];” and (2) the fact that defendant murdered his victim within one month after he was formally charged with burglarizing her mobile home).

197. 686 S.E.2d 557 (Va. App. 2009) (en banc).

his wife, Sarah, which occurred not long after the couple separated. Following their separation, Sarah obtained a protective order against Crawford. In a signed affidavit, Sarah recounted incidents in which Crawford abused her and threatened her life. A few weeks later, Sarah was murdered, and a great deal of evidence linked Crawford to the killing.<sup>198</sup>

Prior to his murder trial, Crawford moved to suppress Sarah's signed affidavit, arguing that the document was testimonial and inadmissible.<sup>199</sup> Rejecting Crawford's argument, the trial court admitted the affidavit under the forfeiture exception, and Crawford was convicted of the murder.<sup>200</sup> A divided appellate court later overturned the trial court's forfeiture ruling, and reversed most of Crawford's convictions.<sup>201</sup> That ruling, however, did not stand.

In an en banc decision,<sup>202</sup> the Virginia Court of Appeals rejected Crawford's confrontation challenge and affirmed his murder conviction.<sup>203</sup> In dicta of its own,<sup>204</sup> the en banc majority discussed the potential application of *Giles*, several times characterizing the pertinent *Giles* passage as part of the *Giles* "holding."<sup>205</sup> Treating the

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198. DNA from the scene matched that of Crawford. In addition, investigators found Crawford's fingerprints in the motel room, along with a pill bottle bearing Crawford's name. *Id.* at 562. When Crawford was arrested in another state, Sarah's car, which was stained with Sarah's blood, was found at the scene of Crawford's arrest. *Id.* The motel clerk subsequently testified that Crawford arrived at the motel the day of Sarah's disappearance, and that he was driving Sarah's car. *Id.*

199. *Id.* at 563.

200. *Id.*

201. *See Crawford v. Commonwealth*, 670 S.E.2d 15 (Va. App. 2008).

202. *Crawford*, 686 S.E.2d at 563.

203. *Id.* at 563–64.

204. In the *en banc* appeal, the Commonwealth argued that the trial court did not err in applying the forfeiture doctrine, and alternatively argued that the Confrontation Clause does not bar the admission of the affidavit because it is not testimonial. *Id.* at 564. The *en banc* majority avoided the forfeiture claim by declaring the affidavit non-testimonial. *See id.* at 572 (Elder, J., dissenting) (recognizing that "the majority's rationale regarding how the Commonwealth *might* go about proving [forfeiture-by-wrongdoing] in a domestic violence case . . . is dictum") (emphasis in original).

205. Because Justice Scalia's *Giles* opinion was a plurality opinion, the court interpreted the *Giles* holding as encompassing "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Crawford*, 686 S.E.2d at 564 n.11 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). According to the *en banc* majority, "all but Part II-D-2" of Justice Scalia's *Giles* opinion "constitutes the holding of *Giles*, as it is the narrowest position of at least five Justices concurring in the result." *Id.* The *Giles* passage quoted above is contained in Part II-E of Justice Scalia's *Giles* opinion. The majority later reiterated its broad reading of the *Giles* "holding" in a footnote. According to the majority, "the holding of *Giles* is that the forfeiture doctrine is broader than simply killing a witness to prevent that



Giles passage as binding, the majority “left open the possibility that a defendant’s intention to prevent testimony might be inferred from the surrounding circumstances, such as in a case of ongoing domestic violence.”<sup>206</sup> The majority considered remanding the case in light of these principles,<sup>207</sup> but instead deemed the affidavit non-testimonial, providing an alternative basis for its admissibility.<sup>208</sup>

Crawford’s dissenting judges interpreted the Giles passage far differently, and argued that Giles requires proof “that the defendant intended to prevent a witness from testifying.”<sup>209</sup> Rejecting the implication that Giles “created a whole new test . . . in the domestic context,” the dissent argued that the Giles dictum merely re-states the methods by which intent is generally inferred. According to the dissent, “in any case in which proof of intent is required, intent may . . . be established with circumstantial evidence,”<sup>210</sup> such as “the accused’s statements and conduct. . . .”<sup>211</sup> In the dissent’s view, the Giles dictum “hardly breaks new legal ground.”<sup>212</sup>

Various other courts have addressed the Giles dictum, and have reached similarly diverse conclusions. The Illinois Supreme Court, for example, declared that “the Giles [dictum]. . . [requires] evidence that . . . the accused was motivated by the desire to prevent the witness from testifying against him at trial.”<sup>213</sup> Not all courts agree. In *People v. Banos*,<sup>214</sup> for example, the California Court of Appeal interpreted the Giles dictum far more expansively, and held that forfeiture applies not only to acts intended to prevent a witness from

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witness from testifying in a pending case.” *Id.* at 566 n.12.

In the majority’s view, “*Giles* holds that the forfeiture doctrine also applies in domestic violence situations where there is evidence of ‘the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution.’” *Id.*

206. *Id.* at 564.

207. *Id.* at 565. On this issue, the *en banc* court concluded that “the trial court incorrectly applied the forfeiture by wrongdoing doctrine, as it was defined in *Giles*.” *Id.* at 565.

208. *Id.* at 566 (“although the trial court admitted the affidavit based upon the applicability of the forfeiture by wrongdoing doctrine, another rationale for its admissibility is reflected in the record before us, and we find that rationale sufficient to affirm the decision of the trial court in admitting the affidavit”).

209. *Crawford v. Commonwealth*, 686 S.E.2d 557, 569 (Va. App. 2009) (Elder, J., dissenting).

210. *Id.* at 572 (emphasis added).

211. *Id.*

212. *Id.* (internal citations omitted).

213. *In re Rolandis G.*, 902 N.E.2d 600, 616 (Ill. 2008).

214. *People v. Banos*, 178 Cal.App.4th 483 (Cal. Ct. App. 2009).

testifying, but also to acts more generally intended to dissuade a witness from cooperating with law enforcement.<sup>215</sup>

#### IV. FACTORS THAT INFLUENCE THE PATH OF A PARTICULAR DICTUM

As the foregoing discussion reveals, dicta can take one of three paths. It can become generally accepted law, it can lose all persuasive influence, or it can generate splits in authority. Placing dicta into its appropriate category is easy in hindsight; the challenge is to determine a dictum's likely path in advance. My research uncovers a host of factors helpful in determining whether dictum will or will not flower into law. While not all factors identified below will apply in every case, and while additional factors are likely also relevant, the

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215. *See id.* at 501. In *Banos*, defendant Manuel Banos was convicted of killing his ex-girlfriend Mary Ann Cortez. *Id.* at 485. Banos had been arrested three times before Cortez was killed. In the first incident, Cortez called 911 and placed the phone down as she and Banos argued. In the 911 recording, Banos repeatedly makes statements such as, "are you going to speak to the cops . . . are you going to shut up, or am I going to [have to] kill you?" *See id.* at 486-88. After this incident, Cortez obtained a protective order against Banos. *Id.* at 488. Banos later violated the protective order, resulting in his arrest. *See id.* at 488. Nine days before a scheduled hearing on Banos's restraining order violation, Banos appeared unannounced at Cortez's apartment. *Id.* at 488-89. After finding Cortez in bed with another man, Banos struck Cortez with a hammer, causing her death. *See id.* at 489-90. At Banos's murder trial, the prosecutor argued that certain out-of-court statements were admissible under the forfeiture exception on the inference that Banos killed Cortez to prevent her from testifying to his prior acts of domestic violence. The trial court admitted these statements over Banos's confrontation objection, *see id.* at 490, and the California Court of Appeal affirmed. *See id.* at 493. Interpreting *Giles*, the court ruled that forfeiture by wrongdoing applies not only to acts intended to prevent a witness from testifying, as *Giles* had held, but also to acts intended to dissuade a witness from cooperating with law enforcement authorities generally, as the *Giles* dicta had implied. *See id.* at 501. According to the *Banos* court, the *Giles* Court's "use of the disjunctive 'or' . . . reflects the court's intent to designate two alternative ways of satisfying the factual predicate for application of the forfeiture by wrongdoing doctrine: evidence that the defendant (1) intended to stop the witness from reporting abuse to the authorities; or (2) intended to stop the witness from testifying in a criminal proceeding." *Id.* at 502. Applying this interpretation, the court then found "substantial evidence" that Banos killed Cortez to prevent her from cooperating with authorities, and to prevent her from testifying, *id.*, either of which would suffice. To support its first finding, the court pointed to Banos's 911 statements indicating that Banos threatened to kill Cortez if she did not "shut up." *Id.* For its second finding, the court found it proper to infer that Banos killed Cortez to prevent her from testifying against him in his earlier restraining order violations. In the court's view, "[t]he trial court reasonably could have found that [Banos] knew he would be prosecuted for these actions and that Cortez would testify at those proceedings." *Id.* at 503. *See also id.* at 504 n.11. According to the court, "[s]ubstantial evidence also supports the implied finding that once defendant broke into Cortez's home on [the night of her killing], he knew that criminal proceedings would be commenced and as she had cooperated with the police before, Cortez was likely to testify at those proceedings." *Id.* at 504.

factors I have identified help differentiate the dicta types at or near the time a dictum is handed down.

Commenting upon the holding/dicta dichotomy, Shawn Bayern has suggested that “there is a continuum or sliding scale of the strength of authority, rather than a sharp split between holdings and dicta,” and that the best evidence of such a sliding scale comes from the way federal courts respond to United States Supreme Court dictum.<sup>216</sup>

Bayern and I agree that the practical meaning of a case does not depend upon formalistic distinctions like “holdings” and “dicta.”<sup>217</sup> We also agree that in interpreting cases, courts are motivated by factors beyond the conventional holding/dicta dichotomy.<sup>218</sup> My pragmatic framework identifies a variety of factors helpful in predicting the actual path of a particular dictum. Bayern seeks to determine an opinion’s overall persuasiveness by uncovering “the intent that motivated the opinion.”<sup>219</sup> While uncovering the issuing court’s intent may prompt consideration of the factors identified below,<sup>220</sup> my approach targets the actual impact of a particular dictum upon the interpreting courts, whereas Bayern’s approach highlights a dictum’s intended impact.

Presumably, under Bayern’s view, a court that is entirely clear about its intent could override all other considerations. I believe the matter is more complex, and that other factors remain influential. For example, a 5–4 decision of the Supreme Court including a highly ambiguous statement made in dictum that prompts vigorous disagreement from four dissenting Justices would not, as Bayern suggests, become the law simply because the majority opinion asserts

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216. Bayern, *supra* note 7, at 143.

217. *See id.* at 125.

218. *Id.* at 126 (“a court’s endeavor in interpreting cases is broader than th[e] [holding/dictum] terminology and the surrounding doctrines suggest.”).

219. *See id.* at 125, 158.

220. For example, on the question of determining the intent of the court that issued the pertinent dictum, Bayern provides a list of factors that are similar, yet less comprehensive than mine. *See id.* at 156 (“[I]t is neither necessarily the case nor even . . . apparently true in many instances that holdings are more carefully reasoned than dicta. Instead, to the extent we care how much a court considered the wisdom of its pronouncements [i.e., the court’s intent], we would do better to focus on that question squarely, using all available contextual information. The context includes such features as the degree to which the relevant issues appear to have been disputed, the depth of the court’s discussion, the arguments to which the opinion says the court was exposed, the degree to which the court itself says it reasoned about the pronouncements, the extent to which the court seems to stand by those pronouncements . . . , and the broad relationship between the facts of the case and the pronouncements.”)

that it should. While Bayern's argument is premised upon one primary factor — the issuing court's intent—my argument is a multi-factor approach.

As exemplified by the above case illustrations, the following factors should be considered in determining the path of a particular dictum:

The number of higher court judges that endorsed the particular dictum;

The depth of the issuing court's discussion of the issue raised in dictum;

Whether statements made in dictum are employed to establish a line of demarcation in an incomplete body of case precedents;

The extent to which the issuing court stands by its pronouncements; and

The relationship between the facts of the case and the pronouncements.

Before examining each of these factors, it is important to clarify the effect of the formal positions taken by reviewing courts on the persuasiveness of a higher court's dicta, particularly those relating to the obiter dicta/judicial dicta distinction. When considering whether a particular dictum will be endorsed by a majority of jurisdictions, experience proves that formal rules regarding the persuasiveness of dicta are not dispositive. While a particular reviewing court's formal position regarding the persuasiveness of dicta may prove influential in isolated instances, one court's rules cannot account for the more general treatment of dicta across all reviewing courts, the focus of my concern. When examining a dictum's impact across all jurisdictions, the overall variability in formal positions across courts—where some courts closely adhere to the obiter dicta/judicial dicta distinction,<sup>221</sup> while others fail to recognize the distinction or do not faithfully apply it<sup>222</sup>—causes this factor to wash out. The very malleability of the terms “holding” and “dicta” may also eliminate this factor from consideration.

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221. The courts of Illinois appear to apply the judicial dicta/obiter dicta distinction faithfully. *See, e.g.,* Nudell v. Forest Preserve Dist. of Cook City, 799 N.E.2d 260, 262–66 (Ill. 2003) (examining directly competing precedents, and affirming the lower court's judgment in favor of the defendant on the ground that the defendant's set of favorable precedents involved judicial dicta, while the plaintiff's proffered precedents involved obiter dicta).

222. *See supra* notes 117-120 and accompanying text.

*A. Factor 1: The Number of Judges that Endorsed the Particular Dictum*

The persuasiveness of a particular dictum depends upon the number of issuing court judges that have endorsed the dictum, as compared to the number of judges opposing it.

Dictum is more likely to flower into law when a greater number of judges have endorsed it. *J.L.* is a 9–0 decision of the United States Supreme Court, and its dictum has been widely accepted. By contrast, the *Giles* dictum was endorsed by only six Justices, and has generated splits in authority. The *Bartkus* dictum was endorsed by five Justices, and has been routinely rejected.

Dictum is also more likely to flower into law when it is explicitly endorsed in concurring opinions, and dictum handed down by a particularly influential judge is likely to have the same effect. As a corollary, dictum is less likely to flower into law when the alternative viewpoints expressed by other writing judges, whether in dissent or in concurrence, are particularly persuasive. When such alternative views are endorsed by a near-majority of judges, and when those competing views are persuasive, lower courts have both motivation and explicit grounds for rejecting the dictum.

*B. Factor 2: The Depth of the Issuing Court’s Discussion of the Dictum*

Tracking the judicial dicta/obiter dicta distinction, dicta is more likely to flower into law when it is the product of a thorough analysis of an issue actually raised in the case.<sup>223</sup> Judicial dicta typically concern points involved in the case and argued by counsel.<sup>224</sup> Some courts give judicial dictum greater weight than obiter dictum;<sup>225</sup> conversely, some courts deem themselves not bound to follow a dictum in which the point at issue was not fully debated.<sup>226</sup> Thus,

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223. See *Scofield*, *supra* note 33, at 19 (suggesting that where “a court’s judicial dicta are the product of a thorough analysis of an issue, the dicta should be treated as having almost as much authority as a [holding]”).

224. *Chance v. Guar. Trust Co. of N.Y.*, 298 N.Y.S. 17, 22 (N.Y. Sup. Ct. 1937).

225. See, e.g., *Cates*, 619 N.E.2d at 717 (“an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if dictum, is a judicial dictum;” “a judicial dictum is entitled to much weight, and should be followed unless found to be erroneous”).

226. *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (citing *Cohens v. Virginia*, 6 Wheat. 264 (1821) (“we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.”)).

while not dispositive, dictum that is the product of a thorough analysis of an issue actually raised in the case is somewhat more likely to flower into law than dictum mentioned in passing.

The United States Supreme Court recently invoked this factor,<sup>227</sup> but not all courts find this factor relevant. Invoking the rule against advisory opinions, some jurisdictions posit that courts have no power to declare principles of law governing future conduct that cannot affect the result in the decided case.<sup>228</sup> In those jurisdictions, the distinction between judicial dicta and obiter dicta carries little weight, and a statement's persuasive value is determined by other factors.

*C. Factor 3: Whether Statements made in Dicta Clarify a line of Demarcation*

Dictum that establishes a line of demarcation in an incomplete body of case precedents is a highly persuasive factor. This is evidenced by the contrast between the Bartkus dictum, an example of dead dicta, and J.L.'s dictum, an example of vibrant dicta. The Bartkus and J.L. dicta appear very similar on the surface, yet differ in this key respect. First, both passages are contained in one short paragraph. Second, like the J.L. dictum, the Bartkus dictum posits that the result of the case would change under somewhat different circumstances. The J.L. dictum is repeatedly invoked to justify rulings consistent with its pronouncement, while the Bartkus dictum is not. Factor 3 may explain the difference.

J.L. implicates a line of cases beginning with *Terry v. Ohio*,<sup>229</sup> in which the Court authorized a suspect's brief detention on the basis of reasonable suspicion.<sup>230</sup> In *Terry*, the officer personally observed the suspects' suspicious activity,<sup>231</sup> so an issue left unresolved was whether, and under what circumstances, an anonymous informant's

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227. *Id.*

228. *See, e.g.,* *Trahan v. State Highway Comm'n*, 151 So. 178, 183 (Miss. 1933) ("no court shall decide, or interfere in, any question unless and until a party having the right to relief in respect to that question is asking it of the court. A decision otherwise would be purely advisory, of no force, and would not be a precedent that would bind any person or court."); *State v. Webster Cnty.*, 227 N.W. 595, 598 (Iowa 1929) (court's discussion setting forth what decision would be if language of statute were different was dictum, and ultimately rejected; court declared that although dictum "is entitled to great respect and careful consideration in the present case . . . it is not binding as a precedent," and that "[i]f we deem it sound, it should be followed; otherwise not").

229. 392 U.S. 1 (1968).

230. *See id.* at 30.

231. *Id.* at 5-7.

report of criminal activity would justify a similar search. Prior to *J.L.*, the Court in *Alabama v. White* declared that an anonymous tip alone is not sufficient to establish reasonable suspicion, but that an anonymous tip would be sufficient if adequately corroborated by police.<sup>232</sup> While the *White* Court would not have found the requisite suspicion on the informant's tip alone, the Court deemed the conduct reasonable because of the partial police corroboration, which confirmed roughly half of the informant's provided information.<sup>233</sup> The Court, however, deemed *White* a "close case."<sup>234</sup>

*White*'s distinction between uncorroborated and partially corroborated anonymous tips formed the center of the dispute in *J.L.* The officers in *J.L.* did not corroborate the critical aspects of the anonymous informant's information.<sup>235</sup> When comparing the case to *White*, the *J.L.* Court found the level of suspicion in *J.L.* lacking.<sup>236</sup> In the Court's view, "[i]f [*Alabama v. White*] was a close case . . . this one surely falls on the other side of the line."<sup>237</sup>

While *J.L.*'s comparison to *White* established a rough line

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232. 496 U.S. 325, 326-29 (1990). In *White*, police received an anonymous tip asserting that *White* would be leaving a specific apartment number, in a specific apartment building, at a specific time, in a brown Plymouth station wagon with a broken tail-light; and would drive to a specified motel in possession of cocaine in a brown attaché case. Officers went immediately to the apartment building and observed an automobile fitting the description. Officers then saw a woman exit the apartment building. However, the officers did not verify exactly what apartment number the woman exited from; further, the officers did not observe a brown attaché case; instead, the woman appeared empty-handed. At this point, the woman entered the station wagon and began to drive in the motel's direction. The officers stopped the car before it reached its destination, thereby preventing the officers from verifying that *White* was in fact driving to the predicted location. After obtaining *White*'s consent to search the car, officers found a brown attaché case in the car, which contained marijuana. On appeal, the United States Supreme Court considered whether the officers had reasonable suspicion to seize *White* and her vehicle. Here, the Court noted that the tip alone would not have justified a *Terry* stop. *Id.* at 329. However, because subsequent police observation corroborated much of the information provided by the informant, the Court found it reasonable to believe the tipster had inside knowledge about the suspect, which made his assertion about the cocaine sufficiently trustworthy. *Id.* at 332.

233. The officers in *White* corroborated roughly four of the eight provided facts. First, a car that fit the description was indeed parked at the named apartment building; second, a woman fitting the informant's description came out of the apartment building; third, the woman got into the car, as predicted; and finally, the car then drove in the general direction of the motel, again as predicted. According to the Court, such partial corroboration made the tip itself more reliable. *Id.*

234. *Id.*

235. As the Court described the facts, apart from the anonymous tip, the officers in *J.L.* had no reason to suspect *J.L.* of any illegal conduct. *See J.L.*, 529 U.S. at 268.

236. *See id.* at 270-71.

237. *Id.* at 271.

between sufficient and insufficient anonymous tips, the line was made even clearer by the J.L. Court's final paragraph of dictum. Thus, it is not surprising that post-J.L. courts have relied upon the J.L. dictum to justify their rulings in cases contemplated by the J.L. Court.

The same cannot be said for the Bartkus dictum. Rather than shedding light upon a developing body of factually-related precedents, the Bartkus dictum hints of an entirely new avenue of argument for double jeopardy claimants. Unlike the J.L. dictum, which was preceded by the White line of cases and which fell in step with those precedents, the Bartkus dictum was a creation of the Bartkus Court. Thus, the Bartkus dictum was far more speculative than its J.L. counterpart, which makes the Bartkus dictum less likely to gain traction.

*D. Factor 4: The extent to which the court stands by its pronouncements*<sup>238</sup>

Another factor affecting a dictum's persuasiveness is the extent to which the issuing court stands by its pronouncements. This is evidenced by both the wording employed by the issuing court, and, to the extent time has passed since the dictum was issued, the court's subsequent statements regarding its dictum.

Dicta stated with certainty, clarity, and forcefulness, are more persuasive than statements made tentatively or conditionally. The Seventh Circuit Court of Appeals deemed this factor particularly persuasive. According to the Seventh Circuit,

When the [Supreme] Court's view is embodied in . . . a recent dictum that considers all the relevant considerations and adumbrates an unmistakable conclusion, it would be reckless to think the Court likely to adopt a contrary view in the near future. In such a case the dictum provides the best . . . guide to what the law is, and it will ordinarily be the duty of a lower court to be guided by it.<sup>239</sup>

The degree to which the issuing court has later weakened its own dictum is also potentially relevant. In declaring itself bound by Supreme Court dictum "almost as firmly as by . . . outright holdings," the Tenth Circuit Court of Appeals identified criteria that affect the

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238. Bayern, *supra* note 7, at 156.

239. Reich v. Cont'l Cas. Co., 33 F.3d 754, 757 (7th Cir. 1994) (emphasis added).



strength by which it sees itself bound.<sup>240</sup> One of those factors is the degree to which the court's subsequent statements have "enfeebled" the dictum.<sup>241</sup> If part of what makes dicta persuasive is its tendency to indicate how a higher court might rule on a particular issue, more recent statements of that higher court that question that likely ruling reduce the dictum's overall persuasiveness. Other federal courts agree.<sup>242</sup>

*E. Factor 5: The relationship between the facts of the case and the pronouncements*<sup>243</sup>

Statements tied more closely to the facts of the originating case, like those in *J.L.*, are more persuasive than statements that speculate as to cases bearing less resemblance to the facts before the court, as in *Bartkus*. By the same token, as *Ake* demonstrates, statements of rationale that are broad, or that are disassociated from the particular facts of the case, are more likely to generate splits among future courts.<sup>244</sup>

## V. CONCLUSION

Case holdings are traditionally considered binding while dicta are not. Despite this seemingly straightforward distinction, statements made in dicta actually range from binding to unpersuasive. To account for this reality, dicta can be redefined along pragmatic lines. Case law reveals three pragmatic categories of dicta: dead dicta, or dicta that is relegated to "mere dicta" status; vibrant dicta, or

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240. *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996).

241. *See id.* (in upholding the dismissal of a lawsuit seeking declaratory and injunctive relief against use of the national motto "In God we trust," court found persuasive the statements of the Supreme Court that have tended to support the court's ruling, and noted that "[w]hile these statements are dicta, this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements.").

242. *See City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) (quoting *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("federal courts 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement.'")) (alteration in original).

243. Shawn Bayern briefly noted this factor as one of six factors that would assist in uncovering the intent of the court. *See Bayern, supra* note 7, at 156. Michael Dorf has also discussed the factor in the context of the holding/dictum dichotomy. *See Dorf, supra* note 1, at 2013.

244. *See supra* notes 49–79 and accompanying text.

dicta that routinely becomes the law; and divergent dicta, or dicta that is neither vibrant nor dead, and which generates significant disagreement among courts and scholars. Knowing that dicta can take one of three paths is helpful, but a more significant endeavor is to accurately determine, in advance, a particular dictum's place on the persuasiveness continuum. This article has identified factors helpful in determining a dictum's persuasive influence. In the future, an empirical assessment of the identified factors, including a detailed consideration of the relative worth of each, would further illuminate the proposed framework.